FILED

971962 JUN 4 1998

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,

Petitioner,

v.

CITY OF MORROW, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID H. FLINT*
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT, LLP
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

Attorneys for Petitioner
** Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

114 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipal ordinance which allows on-site commercial advertising signs, prohibits on-site non-commercial advertising signs, and prohibits all off-site commercial signs (billboards) violates the First Amendment.

2. Whether a municipal ordinance's ban of all off-site noncommercial advertising signs can withstand a First Amendment challenge by construing the ordinance so that all noncommercial advertising signs are considered on-site signs which are not prohibited by the ordinance.

3. Whether a municipality can satisfy its burden of proving that a ban of off-site commercial signs (billboards) implements and directly advances no further than necessary a substantial governmental interest by adopting legislative findings and a purpose resolution twenty years after the enactment of the ban.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED 1

STATEMENT OF THE CASE 1

A. Statement of Facts 2

B. History of Proceedings 5

REASONS FOR GRANTING THE WRIT 6

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS ON THE QUESTION OF WHETHER THE CITY OF MORROW'S PROHIBITION AGAINST BILLBOARDS ALSO PLACES AN IMPERMISSIBLE BURDEN ON NONCOMMERCIAL SPEECH IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH CONTROLLING PRECEDENTS OF THIS COURT 7

II. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION ACCEPTING A "STATEMENT OF FINDINGS" ADOPTED TWENTY YEARS AFTER ENACTMENT OF THE MORROW SIGN ORDINANCE TO ESTABLISH THE SUBSTANTIAL GOVERNMENTAL INTERESTS ADVANCED BY THE ORDINANCE CONFLICTS WITH ESTABLISHED PRECEDENT 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) 20

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)..... 6, 20, 21

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) 8, 16, 17, 19

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).....6, 7, 20, 21

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) 7, 9, 10, 16, 19, 21

Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995)..... 21

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985)..... 23

UNITED STATES COURT OF APPEALS DECISIONS

Ackerley Communications of Massachusetts v. City of Somerville, 878 F.2d 513 (1st Cir. 1989) 12, 14

Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) 11, 12

Major Media, Inc. v. City of Raleigh, 792 F.2d 1269 (4th Cir. 1986), *cert denied*, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987)..... 13

Matthews v. Town of Needham, 764 F.2d 58 (1st Cir. 1985)..... 12

TABLE OF AUTHORITIES – Continued

Page

Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993)..... 10, 11, 12

Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994)..... 11, 12

National Advertising Co. v. City of Denver, 912 F.2d 405 (10th Cir. 1990)..... 12

National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988)..... 12, 14

National Advertising Co. v. Town of Babylon, 900 F.2d 551 (2nd Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990)..... 10

Rappa v. New Castle County, 18 F.3d 1043 (3rd Cir. 1994)..... 9, 11

Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988)..... 13

UNITED STATES DISTRICT COURT DECISIONS

Burkhart Advertising, Inc. v. Auburn, 786 F.Supp. 721 (N.D.Ind. 1991)..... 12

Jackson v. City Council of Charlottesville, 659 F.Supp. 470 (W.D.Va. 1987), *aff'd in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988)..... 11, 12

TABLE OF AUTHORITIES – Continued

Page

Metromedia, Inc. v. Mayor and Council of Baltimore, 538 F.Supp. 1183 (D.Md. 1982) 12

National Advertising Co. v. Town of Babylon, 703 F.Supp. 228 (E.D.N.Y. 1989), *aff'd*, 900 F.2d 551 (2nd Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990) 12

STATE APPELLATE COURT DECISIONS

Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988) 12

Lamar-Orlando Outdoor Advertising v. City of Ormond Beach, 415 So.2d 1312 (Fla. Dist. Ct. App. 1982) 13

Metromedia, Inc. v. City of Des Plaines, 326 N.E.2d 59 (Ill. App. Ct. 1975) 12

Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982) 12

R.O. Givens, Inc. v. Town of Nags Head, 58 N.C.App. 697, 294 S.E.2d 388 (1982) 13

Roberts Enterprises, Inc. v. Secretary of Transportation, 699 P.2d 479 (Kan. 1985) 13

Singer Supermarkets v. Zoning Bd. of Adjustments, 443 A.2d 1082 (N.J. Super. Ct. App. Div. 1982) 13

Union City Board of Zoning Appeals v. Justice Outdoor Displays, 266 Ga. 393, 467 S.E.2d 875 (1996) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Making Sense of Billboard Law: Justifying Prohibitions and Exemptions, 88 Mich. L. Rev. 2482 (1990) 10

Who's Afraid of Commercial Speech?, 76 Va. L. Rev. 627 (1990) 17

Wall St. J., June 8, 1994 16

OPINIONS BELOW

1. *Southlake Property Associates, Ltd. v. City of Morrow, Georgia*, 112 F.3d 1114 (11th Cir. 1997). (App., *infra*, p. 1a.).

2. Order, United States District Court for the Northern District of Georgia, Case No. 94-CV-3379-ODE, entered November 11, 1995. (App., *infra*, p. 14a).

3. *Southlake Property Associates, Ltd. v. City of Morrow, Georgia*, Denial of Petition for Rehearing and Suggestion of Rehearing En Banc, Eleventh Circuit Court of Appeals, Case No. 95-9525, entered on March 10, 1998. (App., *infra*, p. 33a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1997, and a timely petition for rehearing was denied on March 10, 1998. (App., *infra*, p. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. Sections 8-5-1 through 8-5-22 of the Code of the City of Morrow, Georgia, which constitutes its sign

ordinance. Because these provisions are lengthy, the text of these sections is set forth in the appendix.

STATEMENT OF THE CASE

This case involves a challenge under the First Amendment to an ordinance of the City of Morrow, Georgia, which bans all off-site advertising signs (billboards) but allows on-site commercial signs. In upholding the ordinance, the Court of Appeals determined that the ordinance does not ban off-site noncommercial signs because all noncommercial speech is on-site. This ruling is directly contrary to the decisions of other federal circuit courts of appeals and state courts of last resort which have decided this question.

The Court of Appeals also held that legislative "findings" adopted by the City of Morrow twenty years after enactment of its sign ordinance satisfied the City's burden of proving that the ban against off-site signs implemented and directly advanced no further than necessary a substantial governmental interest.

These rulings by the Court of Appeals contradict and cannot be reconciled with this Court's decisions and result in a split of opinions with other circuit courts of appeals who have decided these issues.

A. Statement of Facts

1. Petitioner owns a parcel of unimproved real property located adjacent to interstate highway 75 in the City of Morrow, Georgia. Petitioner's property is zoned

commercial and qualifies for the construction and maintenance of outdoor advertising structures, or billboards, under state law. O.C.G.A. § 32-6-70, *et seq.*

The Georgia Department of Transportation (DOT) is the administrative agency responsible for administering the Georgia statute. The DOT will not issue a permit for the construction of a billboard unless the local government certifies that a billboard is a permissible use of the property.

The petitioner seeks to construct billboards on its property in the City of Morrow to advertise the products, services and ideas of others. The messages displayed on the signs would be changed periodically to provide information to the public about goods, products, services, establishments, ideas and events. The signs would provide a medium for communicating commercial, political and noncommercial speech.

In an effort to obtain the necessary permits to allow the construction and maintenance of four billboards on its property, the petitioner submitted DOT sign permit applications to the City for approval. The City refused to approve the applications, citing Section 8-5-3(4) of its sign ordinance which states that billboard signs are prohibited throughout the City.

Following the return of the unexecuted applications, the petitioner submitted them to the DOT requesting the issuance of the outdoor advertising sign permits. The DOT refused to issue the permits because the City would not certify the property as appropriate for construction of outdoor advertising signs.

2. Section 8-5-3(4) of the Morrow Sign Ordinance bans all billboards. That section states as follows:

> Except as otherwise provided by this chapter, the following types of signs are prohibited:
>
> . . .
>
> (4) Billboard signs.

(App., *infra*, p. 42a). Billboard signs are defined in section 8-5-1 as follows:

> Advertising sign or a sign which advertises a commodity, product, service, activity or any other person, place or thing, which is not located, found or sold on the premises upon which the sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated.

(App., *infra*, p. 37a). Due to the ordinance's broad definition of billboard, the ban on billboards includes a ban on all off-site commercial and noncommercial signs.

3. The Morrow Sign Ordinance contains no purpose clause or preamble to explain the basis for its restrictions on the speech which would be displayed on billboards. The ordinance was adopted on September 12, 1974, and has been amended on eleven occasions. On April 26, 1994, in conjunction with enacting other amendments to the ordinance, the mayor and council of the City set forth certain legislative "findings" purportedly expressing the reasons for the ordinance's ban against off-site signs. Prior to this date, no "findings" expressing the reasons for adoption of the restrictions had been adopted.

B. History of Proceedings

Petitioner filed a complaint on December 20, 1994, in the United States District Court for the Northern District of Georgia, contending that the Morrow Sign Ordinance violates the First and Fourteenth Amendments in several different ways: (1) it contains no statement of the governmental interests it seeks to advance; (2) it favors commercial speech over noncommercial speech; (3) it prohibits all off-site noncommercial signs in Morrow; (4) it bans all permanent signs placed in residential districts; and (5) it allows content-based exemptions. The district court granted the City's motion for summary judgment on all claims. (App., *infra*, p. 14a). The Court of Appeals affirmed. (App., *infra*, p. 1a).

In response to petitioner's challenge to the effect of the ordinance on noncommercial speech, the Court of Appeals interpreted the ordinance as allowing noncommercial messages on all on-site signs. The Court of Appeals concluded that "a sign bearing a noncommercial message is on-site wherever the speaker places it." (App., *infra*, 12a). In making that determination the Court of Appeals acknowledged that its decision adopts an "alternative view of the onsite-offsite distinction" and conflicts with decisions of the First, Fourth and Ninth Circuit Courts of Appeals. (App., *infra*, pp. 10a-12a).

With respect to the petitioner's argument that the Morrow Sign Ordinance contains no statement of the governmental interests it seeks to advance, the Court of Appeals concluded that the "statement of findings" adopted in April, 1994, reciting Morrow's interest in

maintaining the "rights of the public to clean, aesthetically pleasing and safe business thoroughfares," were significant governmental interests warranting the prohibition against off-site commercial speech. (App., *infra*, p. 5a).

REASONS FOR GRANTING THE WRIT

The regulation of outdoor commercial advertising and other signage involves recurring issues of great theoretical and practical importance. The perceived public interest in aesthetics and safety has prompted the enactment of sign regulations at the federal level (23 U.S.C. § 131, *et seq.*) and by state and local governments across the country. Tension between those regulations and the protections to citizens' rights of free speech guaranteed by the First Amendment has led to an enormous volume of continuing and inconclusive litigation. The subject of outdoor advertising sign regulation is one that cries out for further guidance from this Court.

This case is an appropriate vehicle for providing that guidance. The Court of Appeals' holding sanctions an alternative view of the distinction between on-site and off-site signs that, as we explain below, this Court and other courts of appeals have condemned. In addition, the Court of Appeals' acceptance of a "statement of findings" adopted twenty years after the enactment of a comprehensive sign ordinance to support a ban on all off-site commercial signs misapplies this Court's holdings in *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), and *Central Hudson Gas & Electric Corp. v.*

Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The writ of certiorari should be granted to provide the Court an opportunity to address these critical issues.

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS ON THE QUESTION OF WHETHER THE CITY OF MORROW'S PROHIBITION AGAINST BILLBOARDS ALSO PLACES AN IMPERMISSIBLE BURDEN ON NONCOMMERCIAL SPEECH IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AND WITH CONTROLLING PRECEDENTS OF THIS COURT.

The Court of Appeals' ruling on the issue of whether Morrow's prohibition against billboards places an impermissible burden on noncommercial speech arises in an area of the law that has been marked by extraordinary confusion. This Court has addressed the application of the First Amendment to outdoor commercial billboard advertising only once in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The Eleventh Circuit relied on the *Metromedia* plurality opinion in concluding that a ban against billboards does not include a ban against signs carrying noncommercial messages by determining that all noncommercial speech is on-site speech. The failure of the plurality opinion in *Metromedia* to define noncommercial speech led the Eleventh Circuit to this misguided conclusion.

While the plurality opinion in *Metromedia* is the seminal decision in this area of the law, the meaning of the

opinion has been the source of unending disagreement. The Court in that case produced five apparently irreconcilable opinions, none of which commanded support from a majority of the Justices. The result in the words of then Justice Rehnquist was "a virtual tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569, 101 S.Ct. at 2924 (Rehnquist, J., dissenting). The problem has been greatly compounded by this Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), which, as explained below, seems contrary to some of the conclusions of the *Metromedia* plurality, and is clearly at odds with the decision of the Court of Appeals in this case.

1. *Metromedia* considered the constitutionality of a San Diego ordinance regulating outdoor advertising signs. To advance the interests of safety and aesthetics, the ordinance established a general prohibition against outdoor advertising signs, subject to several exceptions: it permitted commercial on-site signs and it permitted certain specified categories of noncommercial off-site signs. *See* 453 U.S. at 493-495, 101 S.Ct. at 2885-86. Thus, the San Diego ordinance made distinctions of three types: within the category of commercial speech (by permitting on-site but not off-site commercial signs); within the category of noncommercial speech (by permitting only those types of off-site noncommercial signs that were expressly authorized); and between the categories of commercial and noncommercial speech (by permitting on-site commercial, but not noncommercial, signs).

A plurality of four Justices upheld the constitutionality of the distinction drawn by the ordinance within

the category of commercial speech, *see* 453 U.S. at 508-512, 101 S.Ct. at 2892-95, concluding that a city is permitted by the First Amendment "to value one kind of commercial speech – on-site advertising – more than another kind of commercial speech – off-site advertising." *Id.* at 512, 101 S.Ct. at 2894-95.[1] However, the plurality went on to hold two aspects of the ordinance unconstitutional. Because it believed that "commercial speech cases have consistently accorded noncommercial speech a greater degree of protection than commercial speech," the plurality reasoned that the city could not permit on-site commercial signs while prohibiting noncommercial speech on the same sign. It therefore concluded that "[i]nsofar as the City tolerates billboards at all, it cannot choose to limit their content to commercial messages." *Id.* at 513, 101 S.Ct. at 2895. The plurality also found that the City could not make distinctions within the category of noncommercial speech, explaining that "[w]ith respect to noncommercial speech, the City may not choose the appropriate subjects for public discourse." *Id.* at 515, 101 S.Ct. at 2896.

The decisive votes in *Metromedia* were cast by Justices Brennan and Blackmun, who concurred in the result. 453 U.S. at 521-540, 101 S.Ct. at 2900-2909. These Justices, however, used "a method of analyzing [the ordinance's] constitutionality very different from the plurality's." *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3rd Cir. 1994). Because the ordinance would effectively eliminate

---

[1] Justice Stevens joined this portion of the plurality's opinion. *See* 453 U.S. at 541, 101 S.Ct. at 2909-10 (Stevens, J., dissenting in part).

billboards as a medium of communication in the city, the concurring Justices reasoned that the ordinance could be upheld only if it was narrowly drawn to directly further a substantial state interest. 453 U.S. at 528, 101 S.Ct. at 2903. They found that the ordinance failed this test because the city had neither established "that billboards actually impair traffic safety in San Diego" nor "show[n] that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego." *Id.* at 528, 530, 101 S.Ct. at 2903-04. The concurring Justices expressly disagreed "with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional," *id.* at 536, 101 S.Ct. at 2907, explaining that determining whether certain speech is commercial or noncommercial "would entail a substantial exercise of discretion by a city's officials [and therefore] presents a real danger of curtailing noncommercial speech in the guise of regulating commercial speech." *Id.* at 536-537, 101 S.Ct. at 2907.

Applying the inconsistent opinions of the Justices in *Metromedia* has proven extraordinarily perplexing to lower courts. As a result, "[l]ower court decisions since *Metromedia* have been anything but uniform." Note, *Making Sense of Billboard Law: Justifying Prohibitions and Exemptions*, 88 Mich. L. Rev. 2482, 2488 (1990). While some courts have invalidated ordinances that make any distinction within the category of noncommercial signs, *see, e.g., National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2nd Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990), others have not. *See Messer v. City of Douglasville*, 975 F.2d 1505, 1511-13 (11th Cir. 1992), *cert.*

denied, 508 U.S. 930, 113 S.Ct. 2395, 125 L.Ed.2d 296 (1993). Moreover, some courts, such as the Fourth Circuit in *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994), have upheld any ordinance that does not prefer commercial to noncommercial signs, while the Third Circuit, in contrast, has held that content-based exceptions to a general ban on signs must be "significantly related to the particular area in which the sign is viewed – for example, a sign identifying the property on which it sits." *Rappa v. New Castle County*, 18 F.3d 1043, 1047 (3rd Cir. 1994).

2. Given the confusion in the area of sign control regulation arising out of the five opinions constituting the Court's plurality in *Metromedia*, it is not surprising that the Court of Appeals in this case concluded that "locating the site of noncommercial speech . . . is fraught with ambiguity." (App., *infra*, p. 9a). As a result of the lack of guidance in the *Metromedia* opinion explaining how to determine the site of noncommercial speech, the Court of Appeals adopted what it deems to be "the alternative view of the onsite-offsite distinction." (App., *infra*, p. 12a). The court adopted this view while expressly acknowledging its inconsistency with decisions of the First, Fourth and Ninth Circuits in *Ackerley Communications, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996) (ordinance unconstitutionally favored commercial speech by disallowing off-site noncommercial speech); *Jackson v. City Council of Charlottesville*, 659 F.Supp. 470 (W.D.Va. 1987), *aff'd in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988) (invalidating ordinance because it virtually prohibited noncommercial advertising but permitted on-

site commercial advertising); and *National Advertising Co. v. City of Orange*, 861 F.2d 246, 247-49 (9th Cir. 1988) (city sign ordinance unconstitutionally prohibited off-site non-commercial signs based on their content).[2]

---

[2] Additional courts have differed in their interpretation of *Metromedia*, adding to the reasons why petitioner's application for a writ of certiorari should be granted. These decisions can be divided between those holding that an ordinance containing distinctions between on-premise and off-premise signs is an unconstitutional burden on noncommercial speech (since under traditional analysis only off-premise signs bear noncommercial messages), and those holding that such a distinction is not violative of the Constitution because it is not content-based. These cases are as follows:

A. *Distinction Held Unconstitutional*

Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996); *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985); *Burkhart Advertising, Inc. v. Auburn*, 786 F.Supp. 721 (N.D.Ind. 1991); *National Advertising Co. v. Town of Babylon*, 703 F.Supp. 228 (E.D.N.Y. 1989), *aff'd*, 900 F.2d 551 (2nd Cir.), *cert. denied*, 498 U.S. 852, 111 S.Ct. 146, 112 L.Ed.2d 112 (1990); *Jackson v. City Council of Charlottesville*, 659 F.Supp. 470 (W.D.Va. 1987), *affirmed in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988); *Metromedia, Inc. v. Mayor and Council of Baltimore*, 538 F.Supp. 1183 (D.Md. 1982); *Union City Board of Zoning Appeals v. Justice Outdoor Displays*, 266 Ga. 393, 467 S.E.2d 875 (1996); *Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917 (Va. 1988); *Norton Outdoor Advertising, Inc. v. Village of Arlington Heights*, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982); *Metromedia, Inc. v. City of Des Plaines*, 326 N.E.2d 59 (Ill. App. Ct. 1975)

B. *Distinction Held Constitutional*

Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993); *National Advertising Co. v. City of Denver*, 912 F.2d 405 (10th Cir. 1990); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844

Section 8-5-1(4) of the Morrow Sign Ordinance defines "billboard" as an "advertising sign or a sign which advertises a commodity, product, service, activity or any other person, place or thing, which is not located, found or sold on the premises upon which such sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated." (App., *infra*, p. 37a). Section 8-5-3(4) of the ordinance states that billboards are prohibited. (App., *infra*, p. 42a).

While the ordinance carefully explains the location, spacing and height limitations[3] applicable to (1) signs for specific categories of commercial uses; (2) instructional signs; and (3) temporary signs, it does not provide for the permanent placement of on-premise or off-premise non-commercial signs anywhere within the City. Thus, under the analysis adopted by the First, Fourth and Ninth Circuits in *City of Cambridge, supra, Jackson v. City Council,*

F.2d 172 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994); *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988); *Major Media, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986), *cert denied*, 479 U.S. 1102, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987); *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So.2d 1312 (Fla. Dist. Ct. App. 1982); *Roberts Enterprises, Inc. v. Secretary of Transportation*, 699 P.2d 479 (Kan. 1985); *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388 (1982); *Singer Supermarkets v. Zoning Bd. of Adjustments*, 443 A.2d 1082, 1084 (N.J. Super. Ct. App. Div. 1982).

[3] Limitations on these categories of signs are set forth in sections 8-5-13, 8-5-14 and 8-5-15 of the ordinance. (App., *infra*, pp. 53a-59a).

supra, and *National Advertising Co., supra*, and other courts cited in note 2, *supra*, the Morrow ordinance runs afoul of the plurality's opinion in *Metromedia* because off-site billboards, both commercial and noncommercial, are banned, while on-premise commercial signs are allowed. The Morrow ordinance fails under the analysis adopted by these courts because in paraphrasing the Supreme Court's conclusion in *Metromedia* with respect to noncommercial messages, the First Circuit has stated as follows:

> In other words, if the owner of Joe's Hardware wants to replace his "Joe's Hardware" sign with a sign saying "No Nukes," he must be allowed to do so. This result follows logically from the First Amendment's value structure; if a commercial message overrides the city's aesthetics and safety interests, any message that is at least as important in the First Amendment hierarchy also must override those interests. Because noncommercial speech is entitled to a higher degree of protection than commercial speech, San Diego could decide that its aesthetic and safety interests were outweighed by the need to express commercial messages but not by the need to express noncommercial messages.

Ackerley Communications of Massachusetts v. City of Somerville, 878 F.2d 513, 517 (1st Cir. 1989).

In the instant case, the Eleventh Circuit avoided the result in *City of Somerville* by adopting a strained interpretation of the Morrow ordinance stating as follows:

> Under this view [the view of the First Circuit], the site of noncommercial speech, like commercial speech, is wherever some organized activity associated with the idea espoused is located or found. The expression of an idea anywhere other than at the site of an activity dedicated to that idea is "off site." If an ordinance

> prohibits off-site signs, all noncommercial messages located on signs, other than those located at the site of the activity they espouse, are banned.
>
> There is, however, no logical reason to interpret the ordinance as locating the expression of ideas, aspirations, and beliefs in this way. An idea, unlike a product, may be viewed as located wherever the idea is expressed, i.e., wherever the speaker is located. Under this alternative view, all noncommercial speech is onsite. A sign bearing a noncommercial message is onsite wherever the speaker places it.
>
> Although Morrow's definition of billboard does not explicitly exclude noncommercial speech, it defines billboard as a sign containing an off site message. Under the alternative view of the onsite-offsite distinction, a "billboard" would not include a sign carrying a noncommercial message. Off-site noncommercial signs, therefore, would not be prohibited.

112 F.3d at 1118-19 (footnotes omitted). (App., *infra*, at pp. 10a-12a).

The fallacy of this interpretation is obvious. If all noncommercial signs are on-site, then petitioner would be allowed to construct billboards on its property restricting their messages to noncommercial speech. However, the City refuses to allow petitioner to construct any billboards on its property without regard to the commercial or noncommercial character of the advertising messages. The petitioner's DOT applications which the City refused to execute made no mention of whether the proposed signs would bear commercial or noncommercial messages, yet they were rejected. The District Court upheld

the City's prohibition against any billboards on petitioner's property, and the Court of Appeals affirmed this decision. The Court of Appeals' analysis of the ordinance yields this result: the City's prohibition against any billboards (commercial or noncommercial) being erected on petitioner's property has been approved and sanctioned by the court.

In *Metromedia*, the Court spent considerable time describing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category," *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419, 113 S.Ct. 1511-13, 123 L.Ed.2d 99 (1993), and explaining that this difficulty "carries with it the potential for invidious discrimination of disfavored subjects." *Id.* at 423 n.19, 113 S.Ct. at 1514 n.19. Under the Eleventh Circuit's holding, a local governmental official may allow a sign to be erected if he deems the proposed message to be "noncommercial," but the sign is banned if he deems it to be commercial. Thus, the "alternative view" adopted by the Eleventh Circuit invites censorship of disfavored messages, a concern outlined by Justice Brennan in detail in *Metromedia*.[4] *See* 453 U.S. at 536-38, 101 S.Ct. at 2907-08.

---

[4] This concern is not at all imaginary. Consider an advertisement placed in major newspapers by the R.J. Reynolds Tobacco Co., which carried a picture of the company's chairman smoking a cigarette, with the headline "We do not 'spike' our cigarettes with nicotine," and the statement that "[w]e are committed to bringing the best quality products that we can make to our customers and we will continue to do so." *Wall St. J.*, June 8, 1994, at A15. Is this advertisement commercial speech because it praises a commercial product and seems plainly designed to foster good will towards the company, or is it noncommercial speech because it addresses a significant issue

The Court of Appeals' "alternative view" of the onsite-offsite distinction is an alarming decision not only because it conflicts with the *Metromedia* decision and decisions of other courts of appeal, but also because it invites censorship of disfavored messages. For these reasons, and because the definition of "noncommercial speech" as protected in *Metromedia* needs further definition, the petitioner respectfully requests that a writ of certiorari be issued.

3. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court considered the constitutionality of an ordinance prohibiting newsracks containing commercial handbills adopted by the City of Cincinnati to further its interest in the safety and attractive appearance of its streets and sidewalks. The ordinance did not prohibit newsracks containing newspapers. 507 U.S. at 412-15, 113 S.Ct. at 1508-09. Observing that commercial newsracks "are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks," 507 U.S. at 425, 113 S.Ct. at 1514, the Court held as follows:

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the City, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for

---

of great public concern? It is doubtful that such a distinction can meaningfully be made. *See* Kozniski & Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 638-648 (1990).

> its selective and categorical ban on newsracks dispensing "commercial handbills."

507 U.S. at 428, 113 S.Ct. at 1516.

The Court also concluded that there was an insufficient "fit" between the city's means and ends because its approach would leave in place a large percentage of Cincinnati's many newsracks. *Id.* at 417, 113 S.Ct. at 1510. The Court rejected the city's argument that any diminution in the number of newsracks directly advanced the interests of safety and aesthetics, finding that assertion "an insufficient justification for the discrimination against respondent's use of newsracks that are no more harmful than the permitted newsracks." 507 U.S. at 418, 113 S.Ct. at 1511.

The Court concluded that Cincinnati's actions ran afoul of the First Amendment, stating as follows:

> Not only does Cincinnati's categorical ban on commercial newsracks place too much importance on the distinction between commercial and noncommercial speech, but in this case, the distinction bears no relationship whatsoever to the particular interests that the City has asserted. It is therefore an impermissible means of responding to the City's admittedly legitimate interests. . . .
>
> The City has asserted an interest in aesthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks. Each newsrack, whether containing "newspapers" or "commercial handbills," is equally unattractive.

507 U.S. at 424-25, 113 S.Ct. at 1514. The Court stated that *Metromedia* is not to the contrary, explaining that the plurality in *Metromedia* did not say "that San Diego could *distinguish* between commercial and noncommercial off-site billboards that cause the same aesthetic and safety concerns." 507 U.S. at 425 n.20, 113 S.Ct. at 1514 n.20.

In the instant case, the Court of Appeals concluded that the City of Morrow has asserted an interest in aesthetics and safety in enacting an ordinance regulating signs. The court held that the City may allow off-premise noncommercial signs while prohibiting off-premise commercial signs. As a result, the Court of Appeals has allowed the City to "distinguish between commercial and noncommercial off-site billboards that cause the same aesthetic and safety concerns," which, according to *Discovery Network*, the plurality in *Metromedia* did not authorize. 507 U.S. at 425 n.20, 113 S.Ct. at 1514 n.20.

Just as the publishers' commercial newsracks banned by the City of Cincinnati in *Discovery Network* were no greater an eyesore than the newsracks permitted to remain, the commercial billboards banned by the City of Morrow are no greater an eyesore than the noncommercial billboards permitted to remain. Each off-site billboard, whether containing a commercial or noncommercial message, has the same appearance. Accordingly, like the Cincinnati ordinance declared unconstitutional in *Discovery Network*, the ordinance upheld by the Court of Appeals in this case is "an impermissible means of responding to the City's admittedly legitimate interests" in aesthetics and traffic safety because Morrow's ban on off-site commercial billboards "bears no relationship whatsoever to the particular interests that the City has

asserted." 507 U.S. at 424, 113 S.Ct. at 1514. The Court of Appeals' reliance on *Metromedia* underscores the tension between *Metromedia* and *City of Cincinnati* which should be resolved by the grant of a writ of certiorari in this case.

II. THE WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION ACCEPTING A "STATEMENT OF FINDINGS" ADOPTED TWENTY YEARS AFTER ENACTMENT OF THE MORROW SIGN ORDINANCE TO ESTABLISH THE SUBSTANTIAL GOVERNMENTAL INTERESTS ADVANCED BY THE ORDINANCE CONFLICTS WITH ESTABLISHED PRECEDENT.

The ban on billboards imposed by the City of Morrow constitutes a significant burden on those desiring to post commercial messages throughout the City. Any law impinging on freedom of expression must be accorded the strictest scrutiny and any party seeking to restrict speech has the burden of justifying it. *Edenfield v. Fane*, 507 U.S. 761, 770, 113 S.Ct. 1792, 1800, 123 L.Ed.2d 543 (1993); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n. 20, 103 S.Ct. 2875, 2882 n. 20, 77 L.Ed.2d 469 (1983). The burden rests upon the City of Morrow to justify its absolute ban on the posting of off-premise commercial sign messages.

In *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), this Court established a four part test for determining the validity of governmental regulations on commercial speech. That test is summarized as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

447 U.S. at 564-66, 100 S.Ct. at 2350-51.[5] This test is applicable to restrictions on signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed.2d 800 (1981).

The City's restrictions on billboards fail to satisfy the second part of the *Central Hudson* test because the ordinance gives no indication of the governmental interests it seeks to advance. The ordinance contains no preamble or purpose clause describing any governmental interests, substantial or otherwise, sought to be advanced by its ban on billboards.

---

[5] The Court recently refined its *Central Hudson* test in *Edenfield v. Fane, supra*. There the Court clarified that under *Central Hudson* (i) the government carries the burden of showing that the challenged regulation advances the government's interest in a direct and material way; (ii) the government's burden is not justified by mere speculation and conjecture; and (iii) a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree. 507 U.S. at 770-71, 113 S.Ct. at 1798-1800. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 115 S.Ct. 1585, 1592, 131 L.Ed.2d 532 (1995) (summarizing the holding in *Edenfield v. Fane*).

In response to petitioner's claim that the ordinance is invalid due to the City's failure to prove a substantial governmental interest sought to be advanced by its adoption, the Court of Appeals relied upon certain "findings" included within an amendment to the ordinance adopted on April 26, 1994. Prior to the adoption of these findings in 1994, the mayor and council had never expressed the reasons why they had imposed a ban on billboards and other restrictions on signs in 1974.

The "findings" adopted by the City on April 26, 1994, are as follows:

(a) The City of Morrow has had in effect a comprehensive Sign Ordinance since September 12, 1974, governing the location, size and number of signs which can be erected in the City; such ordinance has its highest impact on commercial areas of the City;

(b) Said Ordinance and its amendments have sought to ensure a balancing of the rights of individuals and businesses to make information available through signage with the rights of the public to clean, aesthetically pleasing and safe business thoroughfares;

(c) As a result of its comprehensive sign regulatory scheme, commercial areas of the City of Morrow present an aesthetically pleasing environment which supports and promotes robust business activity within the City as well as providing a zone for traffic substantially free of unsafe diversions;

(d) The intention of the City and its enforcement efforts have never been directed toward the content of advertising in the City;

(e) There nevertheless appear to be some ambiguities in the text of the Ordinance which have resulted in confusion of the City's purposes by certain persons desirous of erecting signs within the City;

(f) It is the desire of the Mayor and Council of the City of Morrow to amend the terms of the Ordinance so as to clarify its practice and procedures.

(App., *infra*, pp. 66a-67a).

These statements fall woefully short of the *Central Hudson* requirement that an ordinance infringing the commercial speech rights of citizens must implement a substantial governmental interest in a direct and material way because these statements summarize the effect of the enactment of an ordinance twenty years earlier. They do not set forth substantial governmental interests sought to be advanced by an ordinance adopted at the time of adoption of the findings; instead they "amount to little more than unsupported assertions" not based upon evidence or authority, and fail to establish any evils to be eliminated by their restrictions. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49, 105 S.Ct. 2265, 2280, 85 L.Ed.2d 652 (1985) (Ohio rule prohibiting attorneys from utilizing illustrations in advertising held unconstitutional because state's arguments in favor of the ban were unsupported assertions not based upon any evidence or authority).

This case merits the grant of a writ of certiorari to allow the Court to address the question of whether a government can meet its burden under *Central Hudson* by adopting findings subsequent to, as opposed to antecedent to, or simultaneously with, the adoption of the challenged restrictions on speech.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

DAVID H. FLINT*
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT, LLP
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

Attorneys for Petitioner

**Counsel of Record*

June 3, 1998

SOUTHLAKE PROPERTY ASSOCIATES, LTD., a Georgia Limited Partnership, Plaintiff-Appellant,

v.

CITY OF MORROW, GEORGIA, a Political Subdivision of the State of Georgia, Defendant-Appellee,

Joyce Bean, Defendant.

No. 95-9525.

United States Court of Appeals, Eleventh Circuit.

May 15, 1997.

Appeal from the United States District Court for the Northern District of Georgia.

Before BARKETT, Circuit Judge, and DYER and HILL, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Southlake Property Associates, Ltd. brought this action to enjoin enforcement of the City of Morrow's sign ordinance, arguing that the ordinance, on its face, violates the First and Fourteenth Amendments to the United States Constitution as well as similar provisions of the State of Georgia Constitution. On cross motions for summary judgment, the district court found no violation of either constitution, and denied injunctive relief. For the following reasons, we affirm.

I. Background

Southlake Property Associates, Ltd. (Southlake) is a Georgia limited partnership which owns unimproved real property adjacent to Interstate Highway 75 and State Route 401 in Morrow, Georgia. In August 1994, Southlake desired to erect four offsite outdoor advertising billboards on its property, primarily to communicate commercial messages to travelers on I-75. To do so, Southlake was required to obtain certification from the City of Morrow (Morrow) stating that the signage is consistent with local law. Southlake applied for this certification; Morrow denied it.

Morrow's sign ordinance prohibits billboards.[1] Section 8-5-1(4) of the ordinance defines a billboard as an:

> [a]dvertising sign or a sign which advertises a commodity, product, service, activity or any other person, place or thing, which is not located, found, or sold on the premises upon which such sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated.

"Advertising sign" is defined in § 8-5-1(1) as

> any letter, figure, character [etc.] . . . which shall be so constructed, placed, attached [etc.] . . . so

---

[1] The City of Morrow Code of Ordinances, § 8-5-3, states in part:

> Except as otherwise provided by this chapter, the following types of signs are prohibited:
>
> . . .
>
> (4) Billboard signs.

> that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine or merchandise whatsoever . . . so as to draw the attention of passerby [sic] . . .

Southlake alleges that, on its face, the ordinance violates the First and Fourteenth Amendments in several different ways: (1) it contains no statement of the governmental interests it seeks to advance; (2) it favors commercial over noncommercial, *i.e.*, political or ideological speech; (3) it prohibits *all* offsite noncommercial signs in Morrow; (4) it bans all permanent signs placed in residential districts; and (5) it allows content-based exemptions. The district court granted summary judgment to Morrow on each of these claims; Southlake reasserts all five issues on appeal.

Southlake's claims fall into two categories: (1) that the ordinance impermissibly regulates *commercial* speech; and (2) that the ordinance unconstitutionally burdens *noncommercial* speech.

II. Discussion

A. *Commercial Speech*

Prior to 1976, purely commercial advertisements of goods or services were thought to be outside the protection of the First Amendment. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942). In 1976, however, the Supreme Court held that no state may completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon its

recipients. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

The Court has continued to observe, however, a distinction between commercial and noncommercial speech, holding that the former may be regulated in situations where the latter may not be. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-81, 383-84, 97 S.Ct. 2691, 2706-08, 2708-09, 53 L.Ed.2d 810 (1977); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 32, 96 S.Ct. 2440, 2452 n. 32, 49 L.Ed.2d 310 (1976).

Finally, in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 562-63, 100 S.Ct. 2343, 2349-50, 65 L.Ed.2d 341 (1980), the Court held: "[t]he Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[2] The Court adopted a four-part test for evaluating the constitutionality of governmental regulation of commercial speech as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful

---

[2] *But see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427-31, 113 S.Ct. 1505, 1515-18, 123 L.Ed.2d 99 (1993) (ordinance banning newsracks carrying commercial advertisements but permitting those carrying newspapers unconstitutional).

activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id.* at 563-66, 100 S.Ct. at 2350-51.

Southlake asserts that Morrow's ordinance fails the second prong of this test by failing to articulate a significant governmental interest. Southlake argues in its brief that Morrow's ordinance contains "no indication of the governmental interests it seeks to advance."[3] At oral argument, however, Southlake admitted that the ordinance does contain a "Statement of Findings" reciting Morrow's significant interest in maintaining the "rights of the public to clean, aesthetically pleasing and safe business thoroughfares." These purposes have been recognized as significant governmental interests which support restrictions on the time, place, and manner of the display of commercial signs. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise. . . . ").

Southlake's contention at oral argument that this statement of purpose was added to the ordinance *after* it applied for billboard permits is not supported by the

---

[3] If this were so, the ordinance might well fail to meet this prong of the *Central Hudson* test. *See Dills v. City of Marietta*, 674 F.2d 1377, 1381 (11th Cir.1982).

record.[4] Therefore, insofar as Morrow's ordinance regulates commercial speech, it meets the constitutional requirements of *Central Hudson*.[5]

B. *Noncommercial speech*

It does not necessarily follow, however, that Morrow's prohibition on billboards places no impermissible burden on noncommercial speech. To the extent that the ordinance regulates noncommercial speech, it must withstand a heightened level of scrutiny. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456, 98 S.Ct. at 1918-19. Noncommercial speech is fully protected by the First Amendment and Morrow's ordinance must be evaluated by this exacting standard. *Id.*

Morrow's ordinance on its face prohibits billboards, defined as any "sign which advertises a commodity, product, service, activity or any other person, place, or thing, which is not located, found or sold on the premises upon which such sign is located." As the ordinance makes no distinction between commercial and noncommercial messages, the district court held that both commercial and noncommercial speech are included within its definition of billboard. If so, the ordinance prohibits

---

[4] We take this opportunity to reiterate that disputes such as this over a readily ascertainable record fact have no place in the briefs or at oral argument.

[5] Southlake does not raise on appeal any challenge to the ordinance based on the other three *Central Hudson* factors.

all offsite signs bearing noncommercial messages in Morrow.[6]

Morrow denies, however, that its ordinance prohibits offsite signs bearing noncommercial messages. Morrow maintains:

---

[6] The district court relied on *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir.1992), *cert. denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993), to hold this prohibition of offsite, noncommercial signage constitutionally permissible. In *Messer*, however, the prohibition on billboards was limited to the historic district of Douglasville, in which the city had a substantial aesthetic interest. In finding the ordinance sufficiently narrowly drawn, we specifically reserved the question of whether a government's interest in traffic safety and aesthetics are an acceptable justification for a city-wide ban on all offsite noncommercial signs. We held:

> The ordinance does not apply to the entire city of Douglasville. Off-premise noncommercial signs are allowed in the parts of the city not designated as a historic district. Because a blanket ban on off-premise signs is limited to the historic district of Douglasville, we do not need to decide if a government's interests in traffic safety and aesthetics are an acceptable justification for a city-wide ban of off-premise noncommercial signs. We simply decide that the government's interests in the aesthetics of a designated historic district are sufficiently significant to override the First Amendment rights of a property owner to off-premise noncommercial signs.

975 F.2d at 1511.

We have since reiterated that restricting the prohibition of offsite signs to a limited area of the city was a factor in our decision. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569 n. 4 (11th Cir.1993) (city's aesthetic interests in preserving *historic district* supported content neutral restriction upon offsite commercial and noncommercial signs) (emphasis added).

> The City has never interpreted its Ordinance to disallow noncommercial speech. Further, the City's [sic] has documented a three-year history of permitting noncommercial off-premise messages to be posted on commercial properties throughout the City. These provisions demonstrate a long-standing pattern and practice of the City to allow free expression of noncommercial speech. Further, . . . the City has *never* denied a sign permit for noncommercial speech.
>
> . . .
>
> While billboard is defined by the City Ordinance very broadly, that broad interpretation has been narrowed by the City practice of allowing noncommercial messages off premises over an extended period of time. The City has therefore narrowed its interpretation of billboard to refer to the billboard industry as it exists in commercial practice.

Morrow's contention here is that the ordinance *as applied* permits offsite noncommercial messages. The challenge to this ordinance, however, is on its face. Although the city's interpretation and enforcement of the ordinance are relevant to our inquiry, they are not determinative. *See Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir.1993). If the ordinance, by its own terms, unconstitutionally burdens protected speech, it cannot be saved by an application inconsistent with those terms. *See American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir.1990), *cert. denied*, 500 U.S. 942, 111 S.Ct. 2237, 114 L.Ed.2d 479 (1991).

Our task then is to determine whether the ordinance *on its face* prohibits offsite noncommercial advertising signs, as Southlake contends.[7] We conclude that it does not.

The ordinance permits onsite, but prohibits *offsite* advertising signs. This onsite-offsite distinction is reasonably clear and straightforward in the commercial speech context. The site of a commercial activity can usually be recognized without difficulty. Whether a sign bearing a commercial message is offsite, therefore, is readily ascertainable. Such signs are prohibited. This the Constitution allows. *Metromedia*, 453 U.S. at 512, 101 S.Ct. at 2894-95. *See also Messer v. City of Douglasville*, 975 F.2d 1505, 1508 (11th Cir.1992).

Locating the site of noncommercial speech, however, is fraught with ambiguity. The ordinance prohibits signs which seek to attract attention to any person, place, subject, or thing *not* located on the premises where the person, place, subject, or thing is found. Noncommercial speech usually expresses an idea, an aim, an aspiration, a purpose, or a viewpoint. Where is such an idea located? What is the site upon which the aspiration is found?

In interpreting similar ordinances, many courts have assumed that the address of identifiable groups or associations formed around an idea, aim, philosophy or viewpoint defines the location of the idea. For example, the First Circuit has recently observed, "[t]he only signs containing noncommercial messages that are [onsite] are

---

[7] If so, we must then determine whether this prohibition is allowed by the First Amendment.

those relating to the premises on which they stand, which inevitably will mean signs identifying nonprofit institutions." *Ackerley Comm., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st Cir.1996). Thus, speech advocating racial bigotry is onsite at a Klavern of the Klan; "Save the Whales" is onsite where Greenpeace has an office; and "Jesus Saves" is displayed onsite only where a Christian religious organization is operating.

Under this view, the site of noncommercial speech, like commercial speech, is wherever some organized activity associated with the idea espoused is located or found. The expression of an idea anywhere other than at the site of an activity dedicated to that idea is "offsite." If an ordinance prohibits offsite signs, all noncommercial messages located on signs, other than those located at the site of the activity they espouse, are banned.[8]

---

[8] While there is no claim in this case that the ordinance permits bias, censorship, or preference regarding a speaker's point of view, and no "hint of bias," *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) in this prohibition of all offsite messages, there is a *selection* of certain messages. *Metromedia* teaches that we may selectively allow certain kinds of *commercial* speech, but we may not do the same in the *noncommercial* speech arena. 453 U.S. at 514, 101 S.Ct. at 2896. Many courts, therefore, which view the site of noncommercial speech, like commercial speech, to be wherever some organized activity associated with the idea espoused is located, have invalidated ordinances prohibiting all offsite signs. *See, e.g., Ackerley*, 88 F.3d at 37 (ordinance unconstitutionally favored commercial speech by disallowing offsite noncommercial speech); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 247-49 (9th Cir.1988) (city sign ordinance unconstitutionally prohibited offsite noncommercial signs based on their content); *Jackson v. City Council*, 659 F.Supp. 470

There is, however, no logical reason to interpret the ordinance as locating the expression of ideas, aspirations, and beliefs in this way. An idea, unlike a product, may be viewed as located wherever the idea is expressed, *i.e.*, wherever the speaker is located.[9] Under this alternative

---

(W.D.Va.1987) (invalidating ordinance because it virtually prohibited noncommercial advertising but permitted onsite commercial advertising), *aff'd in part, vacated in part*, 840 F.2d 10 (4th Cir.1988). *Cf. National Advertising Co. v. City of Denver*, 912 F.2d 405, 409 (10th Cir.1990) (ordinance constitutional because prohibition of offsite signs limited to commercial speech); *Metromedia, Inc. v. Mayor and City Council of Baltimore*, 538 F.Supp. 1183 (D.Md.1982) (ordinance facially invalid since prohibited owner of commercial property from displaying ideas of others).

Some municipalities have read *Metromedia* to prohibit the banning of offsite noncommercial messages and have specifically limited their prohibition of billboards to those displaying commercial messages. These ordinances have been upheld. *National Advertising Co. v. City of Denver*, 912 F.2d 405, 409 (10th Cir.1990) (the preference for noncommercial over commercial advertising under the new ordinance is the kind of underinclusiveness the First Amendment tolerates); *Major Media, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir.1986) (sign ordinance expressly excludes noncommercial messages from its prohibitions); *Lamar-Orlando Outdoor Advertising v. City of Ormond Beach*, 415 So.2d 1312 (Fla. 5th DCA 1982) (ordinance reaches only commercial speech); *R.O. Givens, Inc. v. Town of Nags Head*, 58 N.C.App. 697, 294 S.E.2d 388 (1982) (ordinance restricts commercial speech only); *Singer Supermarkets v. Zoning Bd. of Adjustment*, 183 N.J.Super. 285, 443 A.2d 1082, 1084 (App.Div.1982) (ordinance does not reach noncommercial speech).

[9] The Supreme Court's holding in *City of Ladue v. Gilleo*, 512 U.S. 43, 56, 114 S.Ct. 2038, 2046, 129 L.Ed.2d 36 (1994), recognizes the significance of locating an idea at the site of the speaker: "Displaying a sign from one's own residence often

view, all noncommercial speech is onsite. A sign bearing a noncommercial message is onsite wherever the speaker places it.

Although Morrow's definition of billboard does not explicitly exclude noncommercial speech, it defines billboard as a sign containing an offsite message. Under the alternative view of the onsite-offsite distinction, a "billboard" would not include a sign carrying a noncommercial message.[10] Offsite noncommercial signs, therefore, would not be prohibited. This result is consistent with Morrow's enforcement of its ordinance.

Which view of Morrow's ordinance is correct? As Morrow itself concedes, the ordinance's definition of billboard is ambiguous. In evaluating this facial challenge to the ordinance, we must construe the ambiguity, if possible, in a manner which avoids any constitutional problems. *American Booksellers*, 919 F.2d at 1500. *See also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277,

---

carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the 'speaker.' "

[10] Indeed, under this view, any ordinance which prohibits billboards, defined as offsite signs, would not limit noncommercial messages anywhere. This does not necessarily mean, however, that all noncommercial signs must be permitted everywhere. *See City of Ladue*, 512 U.S. at 58 n. 17, 114 S.Ct. at 2047 n. 17 ("Nor do we hold that every kind of sign must be permitted in residential areas. Different considerations might well apply, for example, in the case of signs [whether political or otherwise] displayed by residents for a fee. . . . ") What those different considerations might be must await a case presenting the issue of signs for a fee and signs *pro bono*.

285 (5th Cir.1981), *cert. denied*, 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982). In so doing, we must consider Morrow's own authoritative construction of the ordinance, including its implementation and interpretation. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395, 2401-02, 120 L.Ed.2d 101 (1992). We must defer to the City's statutory interpretation so long as its interpretation is based on a permissible construction of the ordinance. *Satellite Broadcasting and Comm. Ass'n v. Oman*, 17 F.3d 344, 347 (11th Cir.1994).

Morrow interprets its ordinance to provide no restraint upon noncommercial speech.[11] We agree. The definition of billboard as an offsite advertising sign does not include noncommercial speech as such speech is always onsite.

III. Conclusion

Morrow's sign ordinance states that it seeks to promote the twin goals of aesthetics and traffic safety. To accomplish these goals it prohibits billboards, defined as offsite advertising signs. This prohibition does not impermissibly restrict commercial speech. The ordinance does not reach noncommercial speech. The ordinance does not offend the Constitution. Accordingly, the summary judgment of the district court is AFFIRMED.

---

[11] Of course, should Morrow reinterpret its ordinance to prohibit noncommercial signage, this would present a different case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHLAKE PROPERTY ASSOCIATES, LTD., a Georgia Limited Partnership	:	CIVIL NO. 1:94-cv-3379-ODE
vs.	:	
CITY OF MORROW, GEORGIA, a Political Subdivision of the State of Georgia	:	(Filed Nov. 16, 1995)

ORDER

In this civil action for injunctive relief, Plaintiff Southlake Property Associates, Ltd. seeks to declare the sign ordinance of the City of Morrow unconstitutional under the First and Fourteenth Amendments of the United States Constitution and similar provisions under the Georgia Constitution. The case is presently before the court on motions by both sides for summary judgment. Plaintiff has also filed a motion to strike the report of W. Ross attached to Defendant's motion for summary judgment. The parties have responded to the relevant motions.

I. FACTUAL AND PROCEDURAL HISTORY

Unless otherwise noted, the relevant facts of this case are undisputed. Plaintiff Southlake Property Associates, Ltd. ("Southlake") is a Georgia limited partnership that owns unimproved real property adjacent to Interstate Highway 75 ("I-75") and State Route 401 in Morrow, Georgia. In August 1994, Southlake desired to erect four

off-premise outdoor advertising billboards[1] on its property primarily to communicate commercial messages to travelers on I-75.[2] To do so, Southlake was required to first comply with Georgia Department of Transportation ("DOT") Rule 672-6-.03 which mandates that individuals desiring to erect outdoor advertising structures first obtain a permit through the DOT. As part of the permit process, DOT Rule 672-6.-04 requires an applicant to obtain city certification stating that the erection is consistent with local law with respect to the intended location of the signs.

Accordingly, Southlake's agent submitted three DOT applications to Joyce Bean, the Permits and Filing Clerk of the City of Morrow ("the City").[3] Bean returned the applications to Southlake unexecuted, however, based in part, Plaintiff believes, on the fact that Morrow's Sign Ordinance prohibits off-premise commercial billboards.[4]

---

[1] An "off-premise" sign is generally one which refers to a person, place, thing or activity unrelated to the site on which the sign is located.

[2] Tazwell Anderson is the general partner of Southlake. He maintains that the signs would likewise provide a medium for political and noncommercial speech. (*See* Anderson Aff., ¶4). Mr. Anderson's deposition testimony makes fairly clear, however, that Southlake's primary purpose and desire in erecting the signs is to profit commercially. (*See* Anderson Depo. pp.30-31, 35).

[3] Southlake filed a fourth application in February 1995.

[4] Bean has provided testimony that there were several problems with Southlake's application unrelated to the City's prohibition of billboards. (*See* Bean Depo. pp. 10, 11). The court does not believe these problems are relevant to the instant action, however, because Plaintiff has lodged a facial challenge against the ordinance.

Southlake nevertheless submitted the applications to the DOT requesting three outdoor advertising sign permits for three separate tracts. DOT refused to issue these permits, however, in part because the City refused to certify the application.[5]

As such, Plaintiff now argues that the ordinance, both with respect to its individual regulations and in its entirety, violates the right to free speech guaranteed in the First and Fourteenth Amendments of the United States Constitution and similar provisions of the Georgia Constitution. Defendant responds that the ordinance as applied is constitutional and intended for the benefit of the citizens of Morrow. Because of the complexity and lengthy nature of Plaintiff's objections to the ordinance, the court will relate separately the provisions of each challenged regulation in the following discussion.

II. MOTION TO STRIKE

As an initial matter, the court must first consider Plaintiff's motion to strike the report of William F. Ross attached to Defendant's motion for summary judgment. Plaintiff maintains that this report contains the legal conclusions of Ross and as such is inadmissible under Fed.R.Civ.P. 56(e). Defendant responds that the report contains factual rather than legal conclusions.

---

[5] Southlake's application also was denied for lack of verification of landowner signature, failure to indicate the location of the signs on the application, and failure to designate between residential and commercial zoning. (*See* Amended and Restated Complaint, Exhibit D).

Plaintiff is correct that portions of Ross' report are clearly legal conclusions which are inadmissible under F.R.E. 704. The report contains, however, a number of factual observations made by Ross which are helpful. These observations include pictures taken of Morrow and surrounding areas which do not have sign ordinances in order to show the more aesthetically pleasing and safe environment in Morrow that has resulted from the regulation. Accordingly, the court will disregard those portions of Ross' report which comprise legal conclusions, but denies Plaintiff's motion to strike the report in its entirety.

III. MOTIONS FOR SUMMARY JUDGMENT

Plaintiff and Defendant have moved for summary judgment on all claims. The court will grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 254, 106 S.Ct. 2505, 2510, 2513, 91 L. Ed. 2d 202 (1986). Under Fed.R.Civ.P. 56(c), summary judgment is mandated against a party who, after adequate discovery, "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the evidence and factual inferences are to be viewed in a light most favorable to the non-moving party, *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987), the nonmoving party is required to do "more than simply show that there is

some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986).

Plaintiff first challenges the sign ordinance's regulation of commercial communication by arguing that the ban on billboards fails to further a significant government interest as required by the Supreme Court's decision in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980). In *Central Hudson*, the Court established a four-part test to use in evaluating the validity of governmental regulation of commercial speech. First, the First Amendment is implicated only with respect to that commercial speech which concerns lawful activity and is not misleading. *Id.* at 566. If the speech is not excluded on the first test, a restriction is valid if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective. *Id. See also Metromedia*, 453 U.S. 490, 507 (1981) (in which the Supreme Court applied this test in evaluating a First Amendment challenge to an ordinance restricting billboards).

Plaintiff maintains that the sign ordinance fails to satisfy the second prong because it contains "no indication of the governmental interests it seeks to advance." (*See* Plaintiff's Brief p.6). In April 1994, however, prior to any event leading to the instant litigation, the City amended its sign ordinance and included the following Statement of Findings:

Section I.: The Mayor and Council find that:

. . . .

(b) Said Ordinance and its amendments have sought to ensure a balancing of the rights of individuals and businesses to make information available through signage with the rights of the public to clean, aesthetically pleasing and safe business thoroughfares;

(c) As a result of its comprehensive sign regulatory scheme, commercial areas of the City of Morrow present an aesthetically pleasing environment which supports and promotes robust business activity within the City as well as providing a zone for traffic substantially free of unsafe diversions;

. . . .

(e) There nevertheless appears to be some ambiguities in the text which have resulted in confusion of the City's purposes by certain persons desirous of erecting signs within the City;

(f) It is the desire of the Mayor and Council of the City of Morrow to amend the terms of the Ordinance so as to clarify its practice and procedures.

Statement of Findings, Ordinance No. 94-04. The legislative history of the ordinance, therefore, reveals that the City was seeking to advance both traffic safety and aesthetics in passing the ordinance. These purposes have been recognized as significant governmental interests. *See Metromedia*, 453 U.S. at 507-508 (noting that it is "far to [sic] late" to question the substantiality of either of these goals).

Plaintiff asserts, however, that this statement of purpose is insufficient given that it appeared after the passage of the original ordinance and does not appear in the codified ordinance. The cases cited by Plaintiff are clearly distinguishable, however, because they involve situations in which the attorneys for cities in the midst of litigation declared what the intended purposes of the ordinances were. *See, e.g., Adams Outdoor Advertising of Atlanta, Inc. v. Fulton County,* 738 F.Supp. 1431 (N.D.Ga. 1990). In the instant case, the City itself prior to any such litigation included a statement of purpose while amending the ordinance. As such, the court finds that the City has adequately satisfied the second prong of the *Central Hudson* test by demonstrating that a legitimate "substantial interest" motivated the passage of the ordinance, and Defendant is entitled to summary judgment on this particular issue.[6]

---

[6] Plaintiff has failed to raise a credible challenge that the ordinance fails to satisfy any of the remaining prongs of the *Central Hudson* test. The ordinance clearly advances traffic safety and aesthetics notwithstanding Plaintiff's assertion that the City's findings to this end represent "mere speculation and conjecture, not based upon any facts." Plaintiff's belief is contradicted by the admissible opinion testimony and photographs found in the report of William F. Ross, a public planning expert. (*See* Defendant's Motion for Summary Judgment, Exhibit B, pp. 17-29). These photographs reveal that the ordinance has resulted in a more aesthetically pleasing environment and fewer traffic diversions in the City than in similar districts with no comparable regulation. *See id.* This conclusion is not disturbed, moreover, by the fact that the City allows on-site but not off-site billboards. *Metromedia,* 453 U.S. at 512. Given the unique harms that are associated with billboards, the ordinance is no broader than necessary to accomplish the City's intended purposes. *See id.* at 508.

Plaintiff next argues that the ordinance is unconstitutional because it permits the erection of commercial billboards that relate to the premises but prohibits billboards bearing non-commercial messages. Because this particular challenge relates to noncommercial aspects of the sign ordinance, the restriction is invalid if it affords greater protection to commercial speech than noncommercial speech even if it passes the *Central Hudson* test. *See Metromedia*, 453 U.S. at 513. While Defendant agrees with Plaintiff that the ordinance does not consider those signs which advertise products, goods or services located on the premises to be prohibited "billboards," it disagrees that the ordinance therefore prohibits noncommercial billboards such that it favors commercial over noncommercial speech in violation of the First Amendment.

While it is clear that all "billboards" are prohibited under the ordinance,[7] the definition of billboard is somewhat ambiguous. Where one interpretation of an ordinance " 'presents a significant risk that the First Amendment will be infringed,' any ambiguity in the [the ordinance] is construed in a manner to avoid such constitutional problems." *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981) (quoting *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502

---

[7] The City of Morrow Code of Ordinances, §8-5-3, states in relevant part:

> Except as otherwise provided by this chapter, the following types of signs are prohibited:
>
> . . .
>
> (4) Billboard signs.

(1979)). The court also must consider the City's authoritative construction of the ordinance and its implementation and interpretation. *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 2402 (1992). Accordingly, the court turns to the specific language of the statute.

Section 8-5-1(4) of the ordinance describes a "billboard" as an

> [a]dvertising sign or a sign which advertises a commodity, product, service, activity or any other person, place or thing, which is not located, found, or sold on the premises upon which such sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated.

"Advertising sign" is defined in §8-5-1(1) as

> any letter, figure, character [etc.] . . . which shall be so constructed, placed, attached [etc.] . . . so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine or merchandise whatsoever which is displayed in any manner whatsoever . . . so as to draw the attention of passerby [sic] . . .

As is obvious, the language of "advertising sign" is extremely broad and would seem to encompass virtually every sign imaginable. As such, it cannot be that the City in defining billboard treats an advertising sign as a subset of billboards rather than treating billboards as a subset of advertising signs. The most reasonable approach to interpreting "billboard," therefore, is to read the clause which follows the words "advertising sign" to restrict the

definition of billboard to include only those advertising signs which in no conceivable way relate to the premises.[8]

Because "billboard" is defined in part as a sign of a particular size and in a particular location that refers to any "activity" not conducted on the premises, the court agrees with Plaintiff that the definition is not limited to commercial messages but instead also encompasses non-commercial messages.[9] The court disagrees, however, with Plaintiff's conclusion that the ordinance therefore impermissibly favors commercial over non-commercial speech. In *Messer v. City of Douglasville*, the Eleventh Circuit considered a similar prohibition on all off-site billboards in Douglasville's historic district.[10] *Messer*, 975

---

[8] Essentially, it appears that the drafters of the ordinance in an overabundance of caution added the words "or a sign" in the event "advertising sign" was interpreted to mean anything less than all signs. While it would have been more prudent for Defendant to simply leave out these words or only to use the term "sign" rather than "advertising sign," this is an insufficient basis on which to hold the ordinance unconstitutional.

[9] The court does not believe, as Defendant suggests, that the word "advertising" necessarily connotes a commercial context. "Advertising" is not itself defined outside of the definition of "advertising sign." Because "advertising sign" includes any sign intended to "draw the attention of [a] passerby" to any "subject," it clearly includes noncommercial messages.

[10] The relevant ordinance in *Messer*, found in The City of Douglasville, Ga. Code §26 (1989) provided:

1. 26-4. Definitions

. . .

Off-premise advertising sign: A sign which directs attention to a building, profession, product, service, activity, or entertainment no [sic] conducted, sold, or

F.2d 1505 (11th 1992), *cert. denied* 113 S.Ct. 2395 (1993). The Court rejected the plaintiff's argument that favoring on-premise signs over off-premise signs favored commercial over non-commercial speech. In doing so, the Court stated:

> We find that the City of Douglasville's sign ordinance prohibiting off-premise billboards is . . . viewpoint neutral. It regulates signs not based on the viewpoint of the speaker, but based on the location of the signs. There is no claim of bias, censorship or preference regarding a speaker's point of view . . . there is simply no basis for equating on-premise signs with commercial speech and off-premise signs with non-commercial speech. A noncommercial enterprise would be able to put up a sign bearing a non-commercial message as long as it relates to any activity on the premises. For example, an auto

---

offered on the property upon which the sign is located.

On-premise sign: A sign which directs attention to a building, profession, product, service, activity, or entertainment conducted, sold, or offered on the property upon which the sign is located.

. . .

Sign: Any name, identification, description, display, illustration, or device which is affixed to or represented directly or indirectly upon the exterior of a building, structure, or land in view of the general public which directs attention to a product, place, activity, person, business, institution.

2. 26-28. Prohibited Signs

. . .

(7) Off-premise or separate use signs.

> mechanic's garage would be able to put up a noncommercial message relating to the recycling of used motor oil.

Id. at 1509. As such, the City's ban of off-premise billboards does not favor commercial over noncommercial speech and is therefore constitutional. *Accord Wheeler v. Commissioner of Highways*, 822 F.2d 586, 591 (6th Cir. 1987), *cert. denied* 484 U.S. 1007 (1988) (distinction between on-site and off-site noncommercial signs constitutionally permissible).[11]

The court can find no support, moreover, for Plaintiff's belief that the ordinance's ban on billboards equates with a ban on all off-premise noncommercial signs in the City. It is true that off-premise noncommercial messages are banned to the extent that they fall within the size and location requirements found in the definition of billboard. Likewise, it is true that the ordinance bans all off-site commercial advertising.[12] See §8-5-7.[13] Neither provision, however, either explicitly or logically leads to the conclusion that all noncommercial signs are prohibited. In fact,

---

[11] Although Plaintiff urges that *Messer* was wrongly decided, this court is bound the decisions of the Eleventh Circuit.

[12] The Court in *Metromedia* held that a city constitutionally may exempt on-site commercial signs without also exempting off-site commercial signs. 453 U.S. at 512.

[13] The ordinance provides as follows:

Sec. 8-5-7. Location restrictions.

. . .

(c) No sign shall be erected or maintained for commercial purposes except on the same lot on which the business, service of product is provided.

the very existence of these provisions leads to the opposite conclusion since they indicate that the City would have explicitly prohibited off-site noncommercial messages had it desired to do so.[14] As such, there simply is nothing in the ordinance indicating that the City has banned the display of all noncommercial messages or limited noncommercial signs to restricted locations.

---

[14] Plaintiff points to the existence of a definition for "marketing sign" as an example of content discrimination in the ordinance. Marketing sign is defined in §8-5-1 as

> [a] sign which has, as its purpose, to promote, advertise or sell a product or service obtainable on the premises where the sign is located, and not to identify the premises.

However, there is no provision in the ordinance treating marketing signs either more or less favorably than any other kind of sign allowed by the City. Only two provisions in the ordinance even mention marketing signs. The first provision appears in the last paragraph of §8-5-4 and provides:

> Marketing signs, where otherwise allowable, must come within the size and type limits for overall wall signage allowed under this section.

The second provision appears in §8-5-9(g) which provides:

> Marketing signs shall be limited to being a part of the allowance for wall or fascia signs, or as window displays, not to exceed twenty-five percent of the window area or building face.

Simply put, the only apparent reason for these two provisions is that claimed by the City – to inform the public that there is no exception made for marketing signs that would "permit extension of signage beyond a maximum allowable on any one business premise." (Def. Brief in Opposition to Plaintiff p. 10). This cannot credibly be said to constitute discrimination against noncommercial speech.

Accordingly, Defendant is entitled to summary judgment on this particular claim.

Defendant is likewise entitled to summary judgment on Plaintiff's claim that the City bans all permanent signs placed in residential districts. There is no dispute that all signage within the City, with the exception of those signs listed in §8-5-21, must have a permit prior to erection and must comply with the size, height, and other specifications found in the ordinance. However, there is no language in the ordinance indicating that permanent signs are prohibited on residential property all together. As discussed above, the City's ban on billboards does not equate with a ban on all off-premise noncommercial speech. Similarly, the fact that the City exempts certain signs from the permit requirement cannot fairly be read to ban all other kinds of signs. *Accord Messer*, 975 F.2d at 1513 (exception to permit requirement is not the same as exception to ban on all speech). As such, Plaintiff's argument has no basis in the language of the statute nor in a reasonable interpretation of its meaning, and Defendant is entitled to summary judgment.

Plaintiff next argues that the ordinance is impermissibly content-based because §8-5-21 exempts the following kinds of signs from the permit requirement:[15] real estate

---

[15] In its entirety, §8-5-21 provides:

> The following advertising structures, advertising signs and advertisements or parts thereof upon which they are posted or displayed are excepted from the permit requirements of this chapter:
>
> (1) Those that are used on particular sites of real property advertising that it is for sale, lease or rent

"for sale" signs; official notices displaced under the direction of a public official; signs denoting the route to cities

---

may be exempt for the permit requirements; providing that the dimensions of the of the sign contained in section 8-5-15(b) are adhered to, that the sign is on the property affected, that it is compatible with the aesthetics of the area, and that is not used by stores, shopping centers, apartments or condominiums; and, that the sign is removed promptly upon consummation of the sale, rental or lease.

(2) Official notices or advertisements posted or displayed by or under the direction of any public official or court officer in the performance of official or directed duties or by trustees under deeds of trust, deeds of assignment, or other similar instruments.

(3) Signs solely to denote the route to any city, town, village or historical place or shrine.

(4) Notices of any railroad, bridge, ferry or other transportation or transmission company neeessary for the direction or safety of the public.

(5) Historical markers erected by duly constituted and authorized public authorities.

(6) Signs erected upon property warning the public against hunting, fishing or trespassing thereon.

(7) Signs erected by Red Cross authorities relating to Red Cross emergency stations.

(8) Highway markers and signs erected or caused to be erected by duly authorized authority.

(9) Name plates not exceeding twenty-four (24) inches by six (6) inches and containing only the name of the business or professional office.

(10) Two (2) corner signs for garage or carport sales located in the city, for the duration of the sale only and in no case to exceed three (3) days. Signs shall not exceed six (6) square feet and shall be mounted in

or other locations; historical markers; railroad and bridge signs; signs prohibiting hunting or trespassing; Red Cross signs; highway markers; business nameplates; garage sale signs; and temporary political candidate signs. Plaintiff also challenges the restrictions attached to temporary political signs exempted from the permit requirement in §8-5-21(11).

It is not at all apparent, however, that Plaintiff raised these claims in its Amended Complaint. Federal Rule of Civil Procedure 8(a) provides that a pleading shall contain " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim

---

such a manner so as not to interfere in any way with vehicular or pedestrian traffic. The sign shall be removed by the responsible party the day after the sale ends. Signs advertising garage and carport sales held outside the city are prohibited.

(11) Signs announcing a candidacy for elected office, or portraying a candidate for political office may be allowed only if placed on private property, only with permission of the property owner, and only if their presence does not pose a safety hazard. No such campaign sign shall be erected more than sixty (60) days prior to the date of the election or prior to the candidate's qualifying for office, whichever occurs first. All signs shall be removed within seventy-two (72) hours of the closing of polls for the election for which the candidacy was offered, and removal shall be the responsibility of the owner of the property. Failure to remove the sign shall constitute a violation of this chapter. The provisions of the laws of the State f [sic] Georgia concerning campaign posters as set out in O.C.G.A. §21-1-1 shall be enforced within the city, and the municipal court shall act as a committal court for violations thereof.

is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In addition, it is clear that pleadings should be "so construed as to do substantial justice." Fed.R.Civ.P. 8(f).

Plaintiff has stated that the court may infer that it raised these challenges in Count III of its Amended and Restated Complaint.[16] In spite of liberal pleading rules, however, the court finds that a fair reading of Plaintiff's Amended Complaint reveals no indication that Plaintiff brought its lawsuit on the theory that the exceptions to the permit system and the restriction on campaign signs

---

[16] Although Plaintiff made this statement in reference to its claim that the restrictions on temporary political signs are unconstitutional, Count III also serves as the only possible provision in the Complaint on which Plaintiff could base its position that it raised a challenge to §8-5-21.

Count III of the Amended Complaint provides in relevant part as follows:

> 24.
>
> The Sign Ordinance prohibits the placement of permanent signs of any size in the yards of residences in the City of Morrow except for signs which identify or advertise businesses or services obtainable at the residences.
>
> 25.
>
> The restrictions in the Sign Ordinance on the content of messages which may be placed on permanent signs in residential zoning districts in the City of Morrow abridge the rights of the plaintiff and the rights of all owners of residences within the City of Morrow under the First and Fourteenth Amendments to the United States Constitution and under Article I, Section I, Paragraph V of the Constitution of the State of Georgia.

were unconstitutional. Because §8-5-21 refers to signs without reference to location and pertains to both temporary and permanent signs, it simply does not follow that Plaintiff intended to challenge this provision in claiming that the ordinance disallows all permanent non-residential signs. As such, the court declines to consider these particular challenges to the City's ordinance.

There is no fact in this case, moreover, indicating that "substantial justice" requires the court to draw the inference from Count III requested by Plaintiff. Plaintiff brought the instant suit out of its desire to erect billboards on commercial property. None of the facts alleged in the instant case indicate that Plaintiff has a genuine interest in the constitutionality of the exceptions to the permit requirement with respect to third parties not before the court other than its desire to see the entire ordinance scheme invalidated. The court finds this reason insufficiently compelling to infer two causes of action that are neither "plain" on the face of the Amended Complaint nor logically related to any claims which are sufficiently pled.

The sign ordinance as a whole represents a comprehensive attempt by the City to regulate the time, place and manner of sign presentation within its borders. Plaintiff has presented no compelling argument that the ordinance as written or applied violates the Constitutional guarantee of free speech. As such, Defendant is entitled to summary judgment in this matter.

IV. CONCLUSION

Accordingly, Plaintiff's Motion to Strike the Report of W. Ross [25-1] is DENIED. Plaintiff's Motion for Summary Judgment [22-1] is DENIED. Defendant's Motion for Summary Judgment [23-1] is GRANTED.

SO ORDERED, this 16 day of November, 1995.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-9525

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,
A Georgia Limited Partnership,

Plaintiff-Appellant,

versus

CITY OF MORROW, GEORGIA, A Political
Subdivision of the State of Georgia,

Defendant-Appellee,

JOYCE BEAN,

Defendant.

On Appeal from the United States District Court for the
Northern District of Georgia

(Filed Mar. 10, 1998)

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: BARKETT, Circuit Judge, and DYER and HILL, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

Chapter 5

SIGNS*

§ 8-5-1. Definitions.
§ 8-5-2. Reserved.
§ 8-5-3. Prohibited signs.
§ 8-5-4. Wall or fascia signs.
§ 8-5-5. Freestanding signs.
§ 8-5-6. Height requirements.
§ 8-5-7. Location restrictions.
§ 8-5-8. Lighting.
§ 8-5-9. Special requirements.
§ 8-5-10. Identification of signs.
§ 8-5-11. Construction and maintenance.
§ 8-5-12. Size requirements.
§ 8-5-13. Regulations and restrictions applicable to specific business categories.
§ 8-5-14. Regulations and restrictions applicable to instructional signs.
§ 8-5-15. Regulations and restrictions applicable to temporary signs.
§ 8-5-16. Nonconforming signs.
§ 8-5-17. Reserved.
§ 8-5-18. Permits.
§ 8-5-19. Erection near rights-of-way.
§ 8-5-20. False advertising.
§ 8-5-21. Exemptions from permit requirements.
§ 8-5-22. Penalties.

---

*Cross reference – Advertising restrictions pertaining to alcoholic beverage establishments. §§ 9-2-43, 9-2-63.

Sec. 8-5-1. Definitions.

For the purpose of this chapter, the following definitions shall apply:

(1) *Advertising sign.* Advertising sign means any letter, figure, character, mark, plane, point, design, poster, pictorial, picture, stroke, stripe, line, trademark, reading-matter or illuminated service, which shall be so constructed, placed, attached, painted, erected, fastened or manufactured in any manner whatsoever, so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine or merchandise whatsoever which is displayed in any manner whatsoever whether outdoors or indoors so as to draw the attention of passersby and is further designated as the area within a continuous perimeter enclosing the limits of writing, representation, emblem or any figure or similar character, together with any frame or other material or color forming an integral part of the display or used to differentiate such sign from the background against which it is placed, excluding the necessary supports or uprights on which such sign is placed; provided, however, that any open space contained within the outer limits of the display face of a sign, or between any component, panel, strip or figure of any kind composing the display face shall be included in the computation of the area of the sign whether such open space be enclosed or not, be it a frame or border.

For projecting or double-faced signs, only one (1) display face shall be measured in computing sign area. If the two (2) faces of a double-faced sign are of unequal area, the area of the sign shall be taken as the area of the larger face.

(2) *Awning.* A rooflike cover extending over or before a place as a shelter and which may be used in lieu of a wall or fascia sign. Such signs must be entirely supported from the building and must not exceed four (4) feet in height.

(3) *Banner.* A banner is a temporary sign which is made of a piece or strip of cloth, paper, canvas, plastic or similar material, on which a message, slogan or emblem is painted, drawn or otherwise projected, colored or shaped for the purpose of advertising or drawing attention to a product, object or facility, to include, but not be limited to, such things as trash receptacle covers, tire covers, rack covers, changeable and/or removable paper, cardboard, cloth, canvas or plastic displays advertising products, services or facilities obtainable or available on the premises.

(4) *Billboard.* Advertising sign or a sign which advertises a commodity, product, service, activity or any other person, place or thing, which is not located, found or sold on the premises upon which such sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated.

(5) *Construction (project) sign.* A sign located on the property where construction or development is taking place and which identifies the contractors, engineers, architects and financial institutions that are involved in the project.

(6) *Freestanding sign.* A sign securely affixed to a steel support structure which is permanently attached to the ground and wholly independent of any building for support, such as monument or stanchion signs.

(7) *Group development area.* An area or parcel of property of sufficient size to allow for the construction or location of more than one (1) business type building or a cluster of businesses to be constructed or located thereon, whether under one (1) roof or several.

(8) Reserved.

(9) Reserved.

(10) *Illuminated sign.* A sign designed to give forth artificial light directly or through translucent material from a source of light within such sign or a sign illuminated by an external light directed primarily toward such sign and so shielded that no direct rays from the light are visible elsewhere than on the lot where said illumination occurs.

(11) *Instructional sign.* A sign used to give direction or specific instruction to the public, such as, but not limited to, "Center," "Exit," "No Parking," "Drive Through," "Rest Room," and so forth. Such signs

shall contain only instructional information and shall not be used for the purpose of business name and/or advertisement.

(12) *Interstate sign.* A permanent freestanding sign not to exceed 100 feet in height which advertises a product or service of specific interest to the motoring public and which is not otherwise prohibited by this chapter. Such signs shall be allowed to any business located on land which it owns or leases, which property contains no less than a fifty-foot frontage contiguous to an interstate highway right-of-way. No interstate sign shall be allowed to any business, whether or not its land lies contiguous to an interstate, that does not own at least one (1) acre of land, one side of which is lying immediately contiguous by no less than fifty (50) feet to the right-of-way of said interstate. Further, no sign shall be permitted to a land owner or lessee where there is insufficient footage between the proposed interstate sign location and that of property owners to either of its sides. (Section 8-5-5(b) governs distances between signs.)

(13) *Marketing sign.* A sign which has, as its purpose, to promote, advertise or sell a product or service obtainable on the premises where the sign is located, and not to identify the premises.

(14) *Mobile sign.* A sign which is attached to, mounted on, pasted on, painted or drawn on any vehicle, whether motorized or drawn, which is placed, parked or maintained at one particular location for the

express purpose and intent of promotion, or conveying an advertising message.

(15) *Monument sign.* A freestanding sign mounted directly upon the ground. Such sign may not be attached to or be a part of or supported by the building in or to which the sign applies. Such ground mounted monument signs must be in conformance with size and height restrictions imposed elsewhere in this chapter.

(16) *Portable sign.* A sign that is constructed of any material that may be moved from one location to another, whether or not it is fastened to an object, building or staked to the ground in any manner at any given time.

(17) *Signature or logo identifier (SLI).* A freestanding sign mounted directly upon the ground which presents to the general public a special type of identifier of an area of ten (10) acres or more that is a multi-business location for hotel(s), office(s), and/or retail shops generally found in such a complex. Such identifiers may not exceed height limitations of twenty-two (22) feet imposed upon other freestanding signs. Size limitations are prescribed elsewhere as are other limitations and specifications.

(18) *Real estate sign.* A temporary sign advertising the sale, rent or lease of the property on which it is located.

(19) *Roof sign.* A sign erected upon and above a roof structure and wholly supported by the roof structure or a structure placed

upon the roof. Roof signs shall also constitute any signage placed upon sloped building fascia intended to appear as or actually be roof elements of the building.

(20) *Spectacular sign.* An advertised display sign, advertising copy that it usually animated, constructed of metal or other material, wired for lights or luminous tubing, or both, with copy action controlled by the flashed circuit breakers, matographs, computers or other electrical, electronic or mechanical means, and attached to or a part of a structure built especially for the purpose.

(21) *Stanchion sign.* A freestanding sign mounted on one (1) or more steel poles set in the ground and of sufficient strength and size to support the advertisement portion of such structure which rests upon or is supported by such poles. Such freestanding signs must be in conformance with size and height restrictions imposed elsewhere in this chapter.

(22) *Wall or fascia sign.* A sign fastened, placed or painted upon or parallel to the exterior wall of the structure itself, whether front, rear or side of the structure and which shall not exceed dimension and lighting restrictions imposed elsewhere in this chapter.

(23) *Wall or fascia sign footage.* The total square footage of the wall area on which a wall or fascia sign is to be placed measured by multiplying the linear length of the wall and the height of the wall from the ground

to the roof line. Parapets or other structures that rise above the roof line shall not be considered part of the wall face.

(Ord. No. 87-03, 5-26-87; Ord. No. 88-07, 10-11-88; Ord. No. 92-10, § 1, 8-11-92; Ord. No. 93-11, § 1, 10-26-93; Ord. No. 94-04, §§ 2, 3, 4-26-94)

Sec. 8-5-2. Reserved.

Editor's note – Ord. No. 94-04, § 4, adopted Apr. 26, 1994, provided that § 8-5-2, Classification of signs, be stricken from the Code. Such section had been derived from Ord. No. 87-03, adopted May 26, 1987.

Sec. 8-5-3. Prohibited signs.

Except as otherwise provided by this chapter, the following types of signs are prohibited:

(1) Roof signs are prohibited, except where no other space is available for mounting of wall or fascia signs, roof signs may be permitted on the mansard facing of mansard style roofs.

(2) Mobile signs;

(3) Portable signs, including corner notices and corner real estate signs;

(4) Billboard signs;

(5) Banner signs;

(6) Spectacular signs;

(7) Rotating or moving signs.

(Ord. No. 87-03, 5-26-87; Ord. No. 94-04, § 5, 4-26-94)

Sec. 8-5-4. Wall or fascia signs.

Wall, fascia or awning signs shall be securely fastened to the building surface. Such signs may not project above the parapet wall.

Wall or fascia signs on buildings with a wall face of two thousand (2,000) square feet or less shall not exceed ninety (90) square feet. For buildings with a wall face in excess of two thousand (2,000) square feet, the maximum sign area allowed is five (5) percent of the wall face or one hundred fifty (150) square feet, whichever is less. The overall length of wall or fascia signs shall not exceed eighty (80) percent of the linear width of the business building frontage. Wall or fascia signs shall not project beyond the building face by more than two (2) feet, except in the case of awning signs. Awning signs shall not project beyond the building face by more than four (4) feet.

The maximum sign letter height on buildings with a wall face of two thousand (2,000) square feet or less is three (3) feet. The maximum sign letter height on a wall face over two thousand (2,000) square feet may be increased by three (3) inches per additional one hundred (100) square feet of wall face, or any part thereof, but shall not exceed five (5) feet in any instance.

On wall or fascia signs larger than ninety (90) square feet that in whole or in part are placed above an entrance to a building, there must be a minimum of twenty-four (24) inches of clear vertical space between the top of the building entrance and the bottom of the wall sign, and there must be a minimum of twenty-four (24) inches of

clear vertical space between the top of the wall sign and the top of the building.

Projecting signs shall be mounted a minimum of eight (8) feet from grade level above pedestrian areas and fourteen (14) feet above vehicular areas.

Direct painting of murals, or any hand painting, etchings or drawings, painted directly upon the fascia surface of a building shall conform to all standards of this chapter, including permit application and issuance.

Marketing signs, where otherwise allowable, must come within the size and type limits for overall wall signage allowed under this section.

(Ord. No. 87-03, 5-26-87; Ord. No. 92-10, § 1, 8-11-92; Ord. No. 93-11, § 1, 10-26-93; Ord. No. 94-04, § 6, 4-26-94)

Sec. 8-5-5. Freestanding signs.

(a) Freestanding signs may either be monument type (ground level signs not exceeding six (6) feet in height) or stanchion signs (mounted on steel structural supports). Such signs shall be securely affixed to a substantial support structure which is permanently attached to the ground, and wholly independent of building support. In the case of monument signs, the primary structural material shall compliment the primary building material so as to achieve similarities and consistency of building materials on the site.

(b) Freestanding signs shall be mounted perpendicular to the fronting street, except that one (1) sign, upon submission and approval of installation, may be used in place of two (2) separate signs on corner lots.

Stanchion signs and monument signs shall be centered fifteen (15) feet behind the property line and shall be fully contained within the property lines with the edge of the sign being at least five (5) feet off the right-of-way. Monument signs shall be centered within the landscape buffer area perpendicular to the fronting street and shall be fully contained within the property lines. No free-standing sign shall be located within thirty (30) feet of an existing freestanding sign, provided this restriction shall not apply to properly installed instructional signs.

(c) Signature or logo identifier (SLI).

(1) Such signs shall be mounted directly upon the ground with internal structural support of sufficient strength to carry the stresses and weight imposed upon such structures by wind or other external forces. All such internal structural supports must be hidden from view. Such signature or logo identifiers shall be landscaped at their base in a manner that presents a pleasing appearance to those passing on adjacent roadways and must be aesthetically commensurate with surroundings. Such identifier's (SLI's) may be lighted from within or without to accentuate or enhance appearances of a logo or signature, but may not have exposed neon tubing.

(2) Such identifiers (SLI's) may be of any innovative or decorative shape such as triangular, curved, ovate, square, round, or rectangular, but must conform to and be in consonance with the surrounding area.

(3) Such identifiers (SLI's) shall be at least fifteen (15) feet behind the street right-of-way

at the sign's center and may not under any circumstance be closer than five (5) feet to a right-of-way at any point. The size of such identifiers (SLI's) shall not exceed, as previously stated above, twenty-two (22) feet in height nor six (6) feet in width at the widest and/or tallest points above the grade level of the adjacent street; or a grand total per face of one hundred thirty-two (132) square feet.

(4) Such identifiers (SLI's) may have two (2) faces for a grand total square footage of two hundred sixty-four (264) square feet but only forty (40) square feet of each facing may be used to present a message or advertisement about the location.

(5) Such message or advertisement area shall be considered as that portion containing the message or advertisement plus three (3) inches bordering the top, ends and bottom of such lettering, printing, marking, carving, engraving or other means of display whatsoever.

(6) When such identifiers (SLI's) are to have two (2) faces for message or advertisement area and such faces are back to back, the identifier shall be erected perpendicular to the main thoroughfare to which it is closest. If triangular in shape or of a shape having a point from which its two (2) faces radiate in different directions, then that point must be placed in such a manner that a line bisecting its center must be perpendicular to the main thoroughfare upon which it rests. Where only one (1) face addresses the main thoroughfare and it is the only face of the

identifier presenting information, a message, logo or advertisement of the location name, it shall be placed parallel to the street or roadway.

(7) All lettering, engraving, carvings, printing, numerals, symbols or other markings purveying any message, advertisement or idea shall be no more than three (3) feet in height and shall be constrained by the forty-square-foot requirement mentioned elsewhere in this section.

(Ord. No. 87-03, 5-28-87; Ord. No. 88-07, 10-11-88; Ord. No. 94-04, § 7, 4-26-94)

Sec. 8-5-6. Height requirements.

(a) Stanchion signs erected along major thoroughfares, except those signs classified as interstate signs, shall be erected to a height of twenty-two (22) feet.

(b) Interstate signs shall not exceed one hundred (100) feet in height.

(c) Ground mount signs shall not exceed six (6) feet in height.

(d) All sign heights shall be measured from the grade level of the adjacent street to which the business has access. The level of the ground shall not be altered in such a way as to provide additional sign height.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-7. Location restrictions.

(a) No freestanding sign may be located within thirty (30) feet of the intersection of street right-of-way lines extended or at a location that would cause an obstruction to vision to vehicular traffic.

(b) No sign shall interfere with road or highway viability or obstruct or otherwise interfere with the safe and orderly movement of traffic.

(c) No sign shall be erected or maintained for commercial purpose except on the same lot on which the business, service or product is provided.

(d) No sign shall be located on any building, fence or other property belonging to another person without the consent of the owner, and as permitted under the provisions of this chapter.

(e) No sign, sign structure or advertising device shall be located on utility poles or within the right-of-way of any street or public roadway.

(Ord. No. 94-04, § 8, 4-26-94)

Sec. 8-5-8. Lighting.

(a) No sign shall give off light which glares, blinds, or has any other such adverse effect on traffic. The light from all illuminated signs shall be established in such a way that adjacent properties and roadways are not adversely affected and that no direct light is cast upon adjacent properties and roadways.

(b) No illuminated sign shall be constructed or maintained within seventy-five (75) feet of the property

line of any single-family dwelling. Signs with flashing, intermittent or animated illumination or effect are prohibited; provided, however, that time and weather informational signs, official warning and regulatory signs are exempt from this restriction.

(c) No series, lines or rows of electric lights shall be allowed, nor shall the city permit any bare bulb illumination, flashing or moving lights or neon tubing not covered with translucent material, except as provided in subsection (d) below.

(d) Neon or other types of illuminated signs may be used in the interior window of a store front. Such signs shall be used only for the purpose of advising the public a place of business is "OPEN" and shall not exceed an overall area of two (2) square feet.

(Ord. No. 87-03, 5-26-87; Ord. No. 93-06, § 1, 7-27-93)

Sec. 8-5-9. Special requirements.

(a) No sign shall be erected which simulates an official traffic control or warning sign or hides from view any traffic or street sign, signal or public service sign.

(b) No sign shall contain statements, words or pictures of an obscene nature.

(c) No sign shall advertise any activity, service, or product prohibited by the laws or regulations of the United States or the State of Georgia or by the ordinance or resolutions of the city.

(d) No sign shall emit or utilize in any manner any sound capable of being detected on any travelled road or highway by a person with normal hearing.

(e) No sign shall be erected on the inside of a curve or in any other manner that may prevent persons using the roadway from obtaining an unobstructed view of approaching vehicles.

(f) For businesses located in buildings for which attachment of a building-mounted sign is not possible due to design of the structure, a sign may be permanently painted on a window surface; provided that the sign does not exceed the size and height restrictions of this chapter and is subject to all permit application and issuance requirements of this chapter.

(g) Marketing signs shall be limited to being a part of the allowance for wall or fascia signs, or as window displays, not to exceed twenty-five (25) percent of the window area or building face. Window displays must be maintained in good taste with other surroundings and in compliance with the provisions of this Code, and be included in the allowable size limitations.

(h) No sign shall be erected in such a manner that it is attached to or placed against a building so as to prevent ingress or egress through any door or window of any such building, nor in such a manner as to obstruct or be attached to a fire escape.

(i) No sign shall be painted on, mounted on, or otherwise attached to a vehicle, board or object which, if left stationary, tends to circumvent the intent of this Code

and the limitations of the sign regulations prescribed herein.

(j) Pennants, banners, flags, balloons, search lights or other attention-getting devices are permitted only with permission of the city manager as provided in section 8-5-15(c). Only small balloons, not to exceed twelve (12) inches in diameter and twelve (12) inches in height, will be considered under the provisions of section 8-5-15(c), and these will be limited in number by the city manager. No other inflatable devices will be permitting under any provisions of the sign code.

(k) No sign shall be erected by nailing, fastening or affixing the sign in any manner to any tree, post, curve, utility pole, or other structure except as set forth herein.

(Ord. No. 87-03, 5-26-87; Ord. No. 91-08, § 1, 8-27-91; Ord. No. 94-04, § 9, 4-26-94)

Cross reference – Maximum size limitations, § 8-5-12.

Sec. 8-5-10. Identification of signs.

Every advertising display sign hereafter erected, constructed or maintained, for which a permit is required shall be plainly marked with the name of the person, firm or corporation erecting and maintaining such sign and shall have affixed on the front thereof the permit number issued for said sign by the city. In case of window displays, the permit number will suffice where the display is maintained by the store licensee.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-11. Construction and maintenance.

(a) No sign shall be erected or maintained unless it is structurally safe, clean and in good repair.

(b) Except as otherwise provided in this chapter, all signs for which a permit is required shall be constructed and maintained in conformance with the city building and electrical codes. Such signs, together with their supports, braces, guys, and anchors shall be kept in good repair and, unless constructed of galvanized or noncorroding metal, shall be given a protective coating as necessary to maintain a clean appearance and safe condition.

(c) Every sign may be inspected by the building inspector from time to time, as the city manager may require, so as to determine the continuing compliance with this Code.

(d) Should any sign become insecure or in danger of falling or otherwise unsafe in the opinion of the city manager or his representative, the owner thereof, or the person or firm maintaining the same, shall upon written notice from the city manager, forthwith in the case of immediate danger and in any case within ten (10) days, secure the same in a manner to be approved by the city manager or his representative, in conformity with the provisions of this Code, or remove such sign. If such notice is not complied with within ten (10) days, a formal citation will be issued for the violation.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-12. Size requirements.

(a) *Interstate signs.* Interstate signs shall not exceed two hundred (200) square feet of sign area.

(b) *Stanchion signs.*

(1) Stachion signs for multiple business parcels exceeding three (3) acres shall not exceed one hundred fifty (150) square feet.

(2) Stanchion signs for single business parcels exceeding three (3) acres shall not exceed one hundred twenty (120) square feet of sign area.

(3) Stanchion signs for parcels less than three (3) acres shall not exceed ninety (90) square feet in size.

(4) Stanchion signs for parcels less than thirty thousand (30,000) square feet in size shall not exceed seventy (70) square feet.

(c) *Monument signs.* Monument signs shall not exceed sixty (60) square feet of total area of monument sign which shall include signage and structure.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-13. Regulations and restrictions applicable to specific business categories.

In addition to general regulations and restrictions applying to all signs, signs for specific categories of commercial uses shall comply as follows:

(1) *Shopping centers and office parks.*

a. Areas designated as shopping centers or office parks shall be permitted one (1) freestanding sign for each major access drive to the property from a public street or highway.

b. Areas designated as office parks shall be allowed one (1) sign per building within the development which shall identify the occupants and shall be placed in an area obscured from view from any public street. Such sign shall be a freestanding sign mounted directly upon the ground which must conform to and be in consonance with the surroundings area and shall not exceed six (6) feet in height, nor sixty (60 square feet of total area. Such sign may only be used for the purpose of a directory and cannot be used for the purpose of additional signage for one (1) or more tenants.

c. Individual signs qualifying as wall or fascia signs may be permitted for individual business in shopping centers or single-story office park developments.

d. Multistory buildings shall be allowed one (1) building sign which shall identify the building or major tenant(s).

(2) *Commercial lots.*

a. Each business located within one (1) parcel of property and fronting on only one (1) roadway, other than a designated shopping center or office park, shall be allowed one (1) freestanding sign, one (1) building-mounted sign and instructional signs as necessary for proper traffic orientation, except where two (2) or more businesses are located under one (1) roof, then

only one (1) sign of the freestanding type specified shall be allowed for all, and further provided that businesses meeting the standards of subsection e of this section shall be permitted one (1) additional freestanding sign.

b. Where such parcels are located with frontage along two (2) roadways, a business will be allowed one (1) freestanding sign and one (1) building-mounted sign on each frontage plus instructional signs as required, provided that only one (1) freestanding sign shall be permitted on each frontage where two (2) or more business are located under one (1) roof, and provided further that at no time shall any single business parcel contain more than a total of four (4) building-mounted and freestanding signs, except as provided in subsection e herein, and at no time shall a single business parcel contain more than five (5) building-mounted and freestanding signs.

c. Those parcels qualifying for interstate signs will be allowed one (1) interstate sign provided that no increase is made in the total allowable number of signs per business or parcel.

d. No lot or parcel shall be allowed more than two (2) freestanding signs, except as provided in subsection e, and at no time shall a lot or parcel be allowed more than three (3) identification signs.

e. Two (2) freestanding signs along a single roadway will be allowed for businesses which hold two (2) or more exclusive franchises to sell products in the city provided that:

   1. The business must have for sale new products on the premises from at least two (2)

separate manufacturing corporations that must have a sale price that averages no less than ten thousand dollars ($10,000.00) per item;

2. There must be a minimum of three hundred seventy-five (375) linear feet of road frontage on the side of the parcel where the second freestanding sign would be placed; and

3. There must be a minimum of one hundred (100) linear feet between the two (2) freestanding signs and the signs must be placed at least fifty (50) linear feet from the corner boundary line of the parcel; and

4. All other provisions of the Code regarding freestanding signs shall apply.

5. On any road frontage where there are two (2) freestanding signs on a single road frontage, both such signs shall be monument signs.

6. A minimum of twenty-five (25) percent of the inventory of each new product offered for sale at a price of not less than ten thousand dollars ($10,000.00) must be maintained on the premises to qualify for the additional sign permitted under this section.

(3) *Apartments, churches, condominiums and schools.* One (1) monument sign not to exceed six (6) feet in height and sixty (60) square feet is allowed.

(Ord. No. 87-03, 5-26-87; Ord. No. 92-03, § 1, 2-11-92; Ord. No. 94-02, § 1, 2-8-94; Ord. No. 94-04, § 10, 4-26-94)

Sec. 8-5-14. Regulations and restrictions applicable to instructional signs.

(a) Such signs shall contain only instructional information and shall not be used for the purpose of business name and/or advertisement.

(b) Signs limited to traffic direction and services are permitted at each major access drive to the property. The signs shall be limited to a minimum number to provide adequate traffic information.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-15. Regulations and restrictions applicable to temporary signs.

(a) *Construction project signs.*

(1) For construction on or development of a commercial or residential lot, one (1) construction sign for each major street frontage shall be allowed which identifies the project, the contractors, architects, engineers and financial institution. Project signs shall not exceed twelve (12) feet in height from ground level.

(2) Size limitations for project signs are as follows:

a. Signs for multiple business parcels exceeding three (3) acres in size, one hundred twenty (120) square feet.

b. Signs for single business parcels exceeding three (3) acres in size, ninety (90) square feet.

c. Signs for parcels less than three (3) acres in size, sixty (60) square feet.

(3) Project signs shall be promptly removed upon eighty (80) percent occupancy of the building, or the project, or completion of the job.

(b) *Real estate signs.* One (1) sign advertising property "for sale," "for rent," or "for lease," will be permitted for each unit available for sale, rent or lease. Such signs may include the name and telephone number of the person, firm or corporation to be contacted with regard to the sale, rental or lease of the premises. Inclusion of additional commercial information on such sign shall result in reclassification of such signs as promotional signs and shall result in abandonment of the permit exemption as provided for in section 8-5-21. Signs advertising residential property shall not exceed six (6) square feet in size. Commercial signs shall not exceed the smaller of ten (10) percent of the square footage of the unit facade or thirty-two (32) square feet. Apartment complexes shall be allowed one (1) sign for the complex advertising vacancies.

(c) *Special signs.*

(1) Temporary signs may be allowed for grand openings and special promotions subject to the approval of the city manager in accordance with the following standards:

a. Such special signs are limited to three (3) times per year for a maximum of ten (10) days each.

b. Special signs are limited to no more than one (1) promotion per calendar quarter, i.e., January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31.

c. The display of special signs must be separated by at least thirty (30) days.

d. the maximum sign letter height of special signs is three (3) feet.

e. Permission of the property owner or lessee must be obtained in writing.

f. No sign or banner shall exceed ninety (90) square feet in area.

(2) Use of a special banner sign to be displayed in lieu of a building-mounted sign pending arrival and installation of such building-mounted sing may be displayed for a maximum period of sixty (60) days from the date of first display, including Saturdays, Sundays and holidays. Display of such "special banner signs" may be granted by the city manager or his designated representative upon presentation to him of proof that a permanent sign is on order and will be installed by the expiration of the sixty (60) days. Positively no extensions will be granted.

(Ord. No. 87-03, 5-26-87; Ord. No. 88-10, 11-8-88; Ord. No. 89-07, § 3, 5-8-89; Ord. No. 93-04, § 1, 6-22-93; Ord. No. 94-04, § 11, 4-26-94)

Sec. 8-5-16. Nonconforming signs.

(a) Signs which on the effective date of this chapter were approved and erected under previous sign restrictions or which became nonconforming with respect to the requirements of this chapter, may continue in existence so long as there is no change in the use of the property, the size of any such sign is not increased beyond that existing as of the effective date of this section or any subsequent change in the ordinance, and the sign has sustained no

damage requiring repairs costing in excess of fifty (50) percent of the sign's value. No such nonconforming sign shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by the sign at the time it became nonconforming. If use of the premises served by the sign ceases for any reason for a period of more than ninety (90) days, then any such sign shall lose its nonconforming status, and any subsequent sign erected for the premises shall conform with the regulations of this chapter.

(b) Any construction, real estate, promotional or special sign erected in violation of this chapter may be removed by duly authorized employees of the city, from any public property or right-of-way, and a responsible party may be cited for such violation.

(c) A conforming sign or advertising device shall not be erected for the same establishment on the same lot with an existing nonconforming sign until the conforming sign has been removed.

(Ord. No. 87-03, 5-26-87; Ord. No. 94-04, § 12, 4-26-94)

Sec. 8-5-17. Reserved.

Editor's note – Ord. No. 94-04, § 13, adopted Apr. 26, 1994, provided for the deletion of § 8-5-17 which pertained to public safety considerations and was derived from Ord. No. 87-03, adopted May 26, 1987.

Sec. 8-5-18. Permits.

(a) No person, firm or corporation shall erect, construct, enlarge, alter, repair, move, improve, or convert

any sign or structure in the city, or cause the same to be done, without first obtaining a separate permit for such a sign or structure from the city manager or his representative. Each application must be accompanied by:

(1) A fee as established from time to time by resolution of the mayor and counsel.

(2) A sketch or drawing of the proposed sign showing size, dimensions, character height and other information as required by the city to establish compliance with this chapter;

(3) A sketch or drawing of the proposed location showing proposed height of installation and distances from all other signs and structures on the lot and public rights-of-way.

(b) If the city manager, or his representative, is satisfied that the work described in an application for permit, and the drawings filed therewith, conform to the requirements of this Code and other pertinent laws and ordinances, upon receipt of the appropriate permit fees, he shall issue a permit to the applicant.

(c) If the application for a permit and the drawings filed therewith describe work which does not conform to the requirements of this Code or other pertinent laws or ordinances, the city official shall not issue a permit, but shall return the drawings to the applicant. Other consideration may be obtained by using the variance, conditional use, or rezoning provisions of the Code of Ordinances.

(d) Conditions of the permit. The city manager or his representative shall act upon an application for a permit with plans as filed, or as amended, without unreasonable or unnecessary delay, but

no action can be taken until the application requirements have been met. A permit issued shall be construed to be a license to proceed with the work and shall not be construed to be a license to proceed with the work and shall not be construed as authority to violate, cancel, alter, or set aside any of the provisions of this Code, nor shall such issuance of a permit prevent the city manager or his representative, from thereafter requiring a correction of errors in plans or in construction, or of violations of this Code. Every permit issued shall become invalid unless the work authorized by such permit is commenced within six (6) months after the time the permit is issued; provided, that, for cause, one (1) or more extensions of time, for periods not exceeding ninety (90) days each, may be allowed, and such extensions shall be in writing by the city manager or his representative. (Ord. No. 87-03, 5-26-87; Ord. No. 94-04, § 14, 4-26-94)

Sec. 8-5-19. Erection on rights-of-way.

No sign of any kind shall be permitted to extend into or above or to be anchored or placed in any portion of the right-of-way of a state or county highway, or city street, or public sidewalk (except official city, state and county signs), and in no case, closer than five (5) feet to a curb line.

(Ord. No. 87-03, 5-26-87; Ord. No. 94-04, § 15, 4-26-94)

Sec. 8-5-20. False advertising.

It shall be unlawful for any person to display untrue, false or misleading statements upon signs, billboards or

other public places, calculated to mislead the public as to anything sold, any services to be performed or information disseminated. The fact that any sign or display shall contain words or language sufficient to mislead an ordinary person in reading it, shall be prima facie evidence of a violation of this section by persons displaying the signs or permitting them to be displayed upon their property, at their residence, establishment or place of business.

(Ord. No. 87-03, 5-26-87)

Sec. 8-5-21. Exemptions from permit requirements.

The following advertising structures, advertising signs and advertisements or parts thereof upon which they are posted or displayed are excepted from the permit requirements of this chapter:

(1) Those that are used on particular sites of real property advertising that it is for sale, lease or rent may be exempt from the permit requirements; providing that the dimensions of the sign contained in section 8-5-15(b) are adhered to, that the sign is on the property affected, that it is compatible with the aesthetics of the area, and that it is not used by stores, shopping centers, apartments or condominiums; and, that the sign is removed promptly upon consummation of the sale, rental or lease.

(2) Official notices or advertisements posted or displayed by or under the direction of any public official or court officer in the performance of official or directed duties or by trustees under deeds of trust, deeds of assignment, or other similar instruments.

(3) Signs solely to denote the route to any city, town, village or historical place or shrine.

(4) Notices of any railroad, bridge, ferry or other transportation or transmission company necessary for the direction or safety of the public.

(5) Historical markers erected by duly constituted and authorized public authorities.

(6) Signs erected upon property warning the public against hunting, fishing or trespassing thereon.

(7) Signs erected by Red Cross authorities relating to Red Cross emergency stations.

(8) Highway markers and signs erected or caused to be erected by duly authorized authority.

(9) Name plates not exceeding twenty-four (24) inches by six (6) inches and containing only the name of the business or professional office.

(10) Two (2) corner signs for garage or carport sales located in the city, for the duration of the sale only and in no case to exceed three (3) days. Signs shall not exceed six (6) square feet and shall be mounted in such a manner so as not to interfere in any way with vehicular or pedestrian traffic. The sign shall be removed by the responsible party the day after the sale ends. Signs advertising garage and carport sales held outside the city are prohibited.

(11) Signs announcing a candidacy for elected office, or portraying a candidate for political office may be allowed only if placed on private property, only with permission of the property owner, and only if their presence does not pose a safety hazard. No such campaign sign shall be erected more than sixty (60) days prior to the date of the

election or prior to the candidate's qualifying for office, whichever occurs first. All signs shall be removed within seventy-two (72) hours of the closing of polls for the election for which the candidacy was offered, and removal shall be the responsibility of the owner of the property. Failure to remove the sign shall constitute a violation of this chapter. The provisions of the laws of the State of Georgia concerning campaign posters as set out in O.C.G.A. § 21-1-1 shall be enforced within the city, and the municipal court shall act as a committal court for violations thereof.

(Ord. No. 87-03, 5-26-87; Ord. No. 94-04, § 16, 4-26-94)

Cross reference – Garage sales, § 9-4-2.

Sec. 8-5-22. Penalties.

Any conviction of a violation of this section shall constitute grounds for the city to refuse to issue or revoke a business license or permit; and further, upon conviction of said violation, the owner or operator shall also be punishable by imprisonment for not more than ninety (90) days; for not more than ninety (90) days at labor on the roads and streets or other public works; by a fine of two hundred fifty dollars ($250.00), either one or more thereof.

(Ord. No. 87-03, 5-26-87)

STATE OF GEORGIA

CITY OF MORROW

ORDINANCE NO. 94-04

AN ORDINANCE TO AMEND THE SIGN ORDINANCE OF THE CITY OF MORROW, AS AMENDED, AND AS CODIFIED IN TITLE 8, CHAPTER 5 OF THE CODE OF ORDINANCES OF SAID CITY, TO CLARIFY PROVISIONS RELATING TO SIGNAGE; TO PROVIDE FOR SIGNAGE ON COMMERCIAL LOTS; TO PROVIDE FOR SIGNS OF A TEMPORARY OR SPECIAL NATURE; TO REPEAL CONFLICTING ORDINANCES; AND FOR OTHER PURPOSES.

BE IT AND IT IS HEREBY ORDAINED by the Mayor and Council of the City of Morrow, Georgia, and by the authority thereof:

Section I: The Mayor and Council find that:

(a) The City of Morrow has had in effect a comprehensive Sign Ordinance since September 12, 1974, governing the location, size and number of signs which can be erected in the City; such ordinance has its highest impact on commercial areas of the City;

(b) Said Ordinance and its amendments have sought to ensure a balancing of the rights of individuals and businesses to make information available through signage with the rights of the public to clean, aesthetically pleasing and safe business thoroughfares;

(c) As a result of its comprehensive sign regulatory scheme, commercial areas of the City of Morrow present an aesthetically pleasing environment which supports and promotes robust business activity within the City as well as providing a zone for traffic substantially free of unsafe diversions;

(d) The intention of the City and its enforcement efforts have never been directed toward the content of advertising in the City;

(e) There nevertheless appear to be some ambiguities in the text of the Ordinance which have resulted in confusion of the City's purposes by certain persons desirous of erecting signs within the City;

(f) It is the desire of the Mayor and Council of the City of Morrow to amend the terms of the Ordinance so as to clarify its practice and procedures.

Section II: Section 8-5-1 of the Sign Ordinance of the City, as amended, is hereby further amended by deleting in their entirety the definitions of "Identification Sign (Secondary)" and "Identification Sign (Primary)" found in Paragraphs (8) and (9) of said Section 8-5-1.

Section III: Section 8-5-1 of said Ordinance, as amended, is further amended by deleting the definitions of "Awning" currently found in Paragraph (2), "Monument Sign" currently found in Paragraph (15), and "Real Estate Sign" currently found in Paragraph (18) of said Ordinance and inserting the following definitions in lieu thereof:

"(2) "Awning" – A roof like cover extending over or before a place as a shelter and which may be used in lieu of a wall or facia sign. Such signs must be entirely supported from the building and must not exceed four (4') feet in height."

"(15) "Monument Sign" – A freestanding sign mounted directly upon the ground. Such sign may not be attached to nor be a part of or supported by the building in or from which the sign applies. Such ground mounted monument signs must be in conformance with size and height restrictions imposed elsewhere in this Chapter."

"(18) "Real Estate Sign" – A temporary sign advertising the sale, rent or lease of the property on which it is located."

Section IV: Section 8-5-2 of said Ordinance, as amended, is stricken in its entirety and shall be reserved for future codification.

Section V: Section 8-5-3 of said Ordinance, as amended, is further amended by deleting the lead-in language and first numbered paragraph of said Section and inserting in lieu thereof the following:

"Except as otherwise provided by this Chapter, the following types of signs are prohibited:

(1) Roof signs are prohibited, except where no other space is available for mounting of wall or fascia signs, roof signs may be permitted on the mansard facing of mansard style roofs.

Section VI: Section 8-5-4 of said Ordinance, as amended, is further amended by deleting the language of

the Sixth and Seventh Paragraphs of said Section concerning murals and classification of signs and inserting the following language in lieu thereof:

> "Direct painting of murals, or any other hand-painting, etchings or drawings, painted directly upon the fascia surface of a building shall conform to all standards of this Chapter, including permit application and issuance.
>
> "Marketing signs, where otherwise allowable, must come within the size and type limits for overall wall signage allowed under this Section."

Section VII: Section 8-5-5(b) of said Ordinance, as amended, is hereby further amended by deleting subsection (b) of said Section in its entirety and inserting the following language in lieu thereof:

> "(b) Freestanding signs shall be mounted perpendicular to the fronting street, except that one (1) sign, upon submission and approval of installation, may be used in place of two (2) separate signs on corner lots. Stanchion signs and monument signs shall be centered 15 feet behind the property line and shall be fully contained within the property lines with the edge of the sign being at least five (5) feet off the right-of-way. Monument signs shall be centered within the landscape buffer area perpendicular to the fronting street and shall be fully contained within the property lines. No freestanding sign shall be located within 30 feet of an existing freestanding sign, provided this restriction shall not apply to properly installed instructional signs."

Section VIII: Section 8-5-7(a) of said Ordinance, as amended, is further amended by deleting the language found in subsection (a) of that section in its entirety and inserting the following in lieu thereof:

> "(a) No freestanding sign may be located within 30 feet of the intersection of street right-of-way lines extended or at a location that would cause an obstruction to vision to vehicular traffic."

Section IX: Section 8-5-9 of said Ordinance, as amended, is hereby further amended by deleting the language of that Section in its entirety, and inserting the following in lieu thereof:

"*Section 8-5-9 – Special Requirements.*

"(a) No sign shall be erected which simulates an official traffic control or warning sign or hides from view any traffic or street sign, signal or public service sign.

"(b) No sign shall contain statements, words or pictures of an obscene nature.

"(c) No sign shall advertise an activity, service or a product prohibited by the laws or regulations of the United States or the State of Georgia, or by the Ordinances or Resolutions of the City of Morrow.

"(d) No sign shall emit or utilize in any manner any sound capable of being detected on any travelled road or highway by a person with normal hearing.

"(e) No sign shall be erected on the inside of a curve or in any other manner that may prevent persons using the roadway from

obtaining an unobstructed view of approaching vehicles.

"(f) For businesses located in buildings for which attachment of a building mounted sign is not possible due to design of the structure, a sign may be permanently painted on a window surface; provided that the sign does not exceed the size and height restrictions of this Chapter and is subject to all permit application and issuance requirements of this Chapter.

"(g) Marketing signs shall be limited to being a part of the allowance for wall or fascia signs, or as window displays, not to exceed 25% of the window area or building face. Window displays must be maintained in good taste with other surroundings and in compliance with the provisions of this Code, and be included in the allowable size limitations.

"(h) No sign shall be erected in such a manner that it is attached to or placed against a building so as to prevent ingress or egress through any door or window of any such building, nor in such a manner as to obstruct or be attached to a fire escape.

"(i) No sign shall be painted on, mounted on, or otherwise attached to a vehicle, board or object which, if left stationary, tends to circumvent the intent of this Code and the limitations of the sign regulations prescribed herein.

"(j) Pennants, banners, flags, balloons, search lights or other attention getting devices are permitted only with permission of the

City Manager as provided in Section 8-5-15(c). Only small balloons, not to exceed 12 inches in diameter and 12 inches in height, will be considered under the provisions of Section 8-5-15(c), and these will be limited in number by the City Manager. No other inflatable devices will be permitted under any provision of the Sign Code.

"(k) No sign shall be erected by nailing, fastening or affixing the sign in any manner to any tree, post, curve, utility pole, or other structure except as set forth herein."

Section X: Section 8-5-13 of said Ordinance, as amended, is further amended by deleting the language of that Section in its entirety and inserting the following in lieu thereof:

"*Section 8-5-13 – Regulations and Restrictions Applicable to Specific Business Categories.*

"In addition to general regulations and restrictions applying to all signs, signs for specific categories of commercial uses shall comply as follows:

"(1) Shopping Centers and Office Parks.

"a. Areas designated as shopping centers or office parks shall be permitted one (1) freestanding sign for each major access drive to the property from a public street or highway.

"b. Areas designated as office parks shall be allowed one (1) sign per building within the development which shall

identify the occupants and shall be placed in an area obscured from view from any public street. Such sign shall be a freestanding sign mounted directly upon the ground which must conform to an be in consonance with the surrounding area and shall not exceed six (6) feet in height nor 60 square feet of total area. Such sign may only be used for the purpose of a directory and cannot be used for the purpose of additional signage for one or more tenants.

"c. Individual signs qualifying as wall or fascia signs may be permitted for individual businesses in shopping centers or single story office park developments.

"d. Multi-story office buildings shall be allowed one (1) building sign which shall identify the building or major tenants.

"(2) Commercial Lots.

"a. Each business located within one (1) parcel of property and fronting on only one roadway, other than a designated shopping center or office park, shall be allowed one (1) freestanding sign, one (1) building mounted sign, and instructional signs as necessary for proper traffic orientation, except where two (2) or more businesses are located under one roof, then only one (1) sign of the freestanding type specified shall

be allowed for all, and further provided that businesses meeting the standards of subsection e of this Section shall be permitted one additional freestanding sign.

"b. Where such parcels are located with frontage along two (2) roadways, a business will be allowed one (1) freestanding sign and one (1) building mounted sign on each frontage plus instructional signs as required, provided that only one (1) freestanding sign shall be permitted on each frontage where two (2) or more businesses are located under one (1) roof, and provided further that at no time shall any single business parcel contain more than a total of four (4) building mounted and freestanding signs, except as provided in subsection e herein, and at no time shall a single business parcel contain more than five (5) building mounted and freestanding signs.

"c. Those parcels qualifying for interstate signs will be allowed one (1) interstate sign provided that no increase is made in the total allowable number of signs per business or parcel.

"d. No lot or parcel shall be allowed more than two (2) freestanding signs, except as provided in subsection e, and at no time shall a lot or parcel be allowed more than three (3) freestanding signs.

"e. Two (2) freestanding signs along a single roadway will be allowed for businesses which hold two (2) or more exclusive franchises to sell products in the City provided that:

"1. The business must have for sale new products on the premises from at least two (2) separate manufacturing corporations that must have a sale price that averages no less than $10,000.00 per item.

"2. There must be a minimum of 375 linear feet of road frontage on the side of the parcel that the second freestanding sign would be placed.

"3. There must be a minimum of 100 linear feet between the two (2) freestanding signs and the signs must be placed at least 50 linear feet from the corner boundary line of the parcel.

"4. All other provisions of the Code regarding freestanding signs shall apply.

"5. On any road frontage where there are two (2) freestanding signs on a single road frontage, both such signs shall be monument signs.

"6. A minimum of 25% of the inventory of each new product offered for sale at a price of not less than $10,000.00 must be maintained on the premises to qualify for the

additional sign permitted under this Section.

"(3) Apartments, Churches, Condominiums and Schools.

"One (1) monument sign not to exceed six (6) feet in height and 60 square feet is allowed."

Section XI: Section 8-5-15(b), (c), (d) and (e) of said Ordinance, as amended, are further amended by deleting those provisions in their entirety and inserting the following in lieu thereof:

"(b) Real Estate Signs. One (1) sign advertising property "for sale," "for rent," or "for lease," will be permitted for each unit available for sale, rent or lease. Such signs may include the name and telephone number of the person, firm or corporation to be contacted with regard to the sale, rental or lease of the premises. Inclusion of additional commercial information on such sign shall result in reclassification of such signs as promotional signs and shall result in abandonment of the permit exemption as provided for in section 8-5-21. Signs advertising residential property shall not exceed six (6) square feet in size. Commercial signs shall not exceed the smaller of 10% of the square footage of the unit facade or 32 square feet. Apartment complexes shall be allowed one sign for the complex advertising vacancies.

"(c) Special Signs.

"(1) Temporary signs may be allowed for grand openings and special promotions subject to the approval of the

City Manager in accordance with the following standards:

"a. Such special signs are limited to three (3) times per year for a maximum of 10 days each.

"b. Special signs are limited to no more than one (1) promotion per calendar quarter, i.e., January 1 – March 31, April 1 – June 30, July 1 – September 30, and October 1 – December 31.

"c. The display of special signs must be separated by at least 30 days.

"d. The maximum sign letter height of special signs is three (3) feet.

"e. Permission of the property owner or lessee must be obtained in writing.

"f. No sign or banner shall exceed ninety (90) square feet in area.

"(2) Use of a special banner sign to be displayed in lieu of a building mounted sign pending arrival and installation of such building mounted sign may be displayed for a maximum period of 60 days from the date of first display, including Saturdays, Sundays, and holidays. Display of such "special banner signs" may be granted by the City Manager or his designated representative upon presentation to him of

proof that a permanent sign is on order and will be installed by the expiration of the said 60 days. Positively no exceptions will be granted."

Section XII: Section 8-5-16 of said Ordinance, as amended, is further amended by deleting the language of that Section in its entirety and inserting the following in lieu thereof:

"*Section 8-5-16 – Nonconforming Signs.*

"(a) Signs which on the effective date of this Chapter were approved and erected under previous sign restrictions or which became non-conforming with respect to the requirements of this Chapter, may continue in existence so long as there is no change in the use of the property, the size of any such sign is not increased beyond that existing as of the effective date of this Section or any subsequent change in the Ordinance, and the sign has sustained no damage requiring repairs costing in excess of fifty (50%) percent of the sign's value. No such nonconforming sign shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by the sign at the time it became nonconforming. If use of the premises served by the sign ceases for any reason for a period of more than 90 days, then any such sign shall lose its nonconforming status and any subsequent sign erected for the premises shall conform with the regulations of this Chapter.

"(b) Any construction, real estate, promotional or special sign erected in violation of this Chapter may be removed by duly authorized employees of the City, from any public property or right-of-way, and a responsible party may be cited for such violation.

"(c) A conforming sign or advertising device shall not be erected for the same establishment on the same lot with an existing nonconforming sign until the nonconforming sign has been removed."

Section XIII: Section 8-5-17 of said Ordinance pertaining to Public Safety Considerations, as amended, is hereby deleted in its entirety.

Section XIV: Section 8-5-18(a)(1) of said Ordinance, as amended, concerning permit fees is hereby amended by striking the language of that section in its entirety and inserting the following in lieu thereof:

"(1) A fee as established from time to time by resolution of the Mayor and Council."

Section XV: Section 8-5-19 of said Ordinance, as amended, concerning erection of signs near public rights of way is hereby amended by striking the language of that section in its entirety and inserting the following in lieu thereof:

"*Section 8-5-19 – Erection on Rights of Way.*

"No sign of any kind shall be permitted to extend into or above or to be anchored or placed in any portion of the right-of-way of a state or county highway, or city street or public sidewalk (except official city, state and county signs)

and in no case, closer than five (5) feet to curb line."

Section XVI: Section 8-5-21 of said Ordinance, as amended, is hereby further amended by the addition of a new Paragraph (11) to said subsection which paragraph shall read as follows:

"(11) Signs announcing a candidacy for elected office, or portraying a candidate for political office may be allowed only if placed on private property, only with permission of the property owner, and only if there presence does not pose a safety hazard. No such campaign sign shall be erected more than sixty (60) days prior to the date of the election or prior to the candidate's qualifying for office, whichever occurs first. All signs shall be removed within 72 hours of the closing of polls for the election for which the candidacy was offered, and removal shall be the responsibility of the owner of the property. Failure to remove the sign shall constitute in a violation of this Chapter. The provisions of the laws of the State of Georgia concerning campaign posters as set out in *O.C.G.A.* § 21-1-1 shall be enforced within the City, and the Municipal Court shall act as a committal court for violations thereof."

Section XVII: All ordinances or parts of ordinances in conflict with this Ordinance are, to the extent of such conflict, hereby repealed.

SO ORDAINED, This 26th day of April, 1994.

CITY OF MORROW
MAYOR AND COUNCIL

By: /s/ Bill McBerry
BILL McBERRY, Mayor

/s/ Jim Millirons
JIM MILLIRONS, Mayor Pro Tem

/s/ John J. Lampl, II
JOHN J. LAMPL, II, Councilman

/s/ Charles O. Sorrow
CHARLES O. SORROW, Councilman

/s/ Virgil L. Kilby
VIRGIL L. KILBY, Councilman

[Signatures Continued on Next Page]

ATTEST:

/s/ Brenda Allen
BRENDA ALLEN
City Clerk

First Reading: 04-12-94

Second Reading: 04-26-94

STATE OF GEORGIA
COUNTY OF CLAYTON
CITY OF MORROW

ORDINANCE 95-03

An Ordinance entitled an Ordinance to amend the Code of Ordinances of the City of Morrow, Georgia, as amended, concerning Title 8, Chapter 5 "Signs"; to clarify the provisions related to the height of stanchion signs; for the benefit of the public and businesses located in Morrow; and, for other purposes.

BE IT ORDAINED AND ENACTED BY THE MAYOR AND COUNCIL OF THE CITY OF MORROW, GEORGIA, AND BY THE AUTHORITY OF THE SAME, IT IS HEREBY ORDAINED THAT THE FOLLOWING AMENDMENT SHALL BE MADE TO TITLE 8, CHAPTER 5 "SIGNS" OF THE MORROW CITY CODE OF ORDINANCES:

SECTION I:

***Sec. 8-5-6(a)* of Title 8, Chapter 5 "Signs" of the Morrow Code of Ordinances shall be deleted in its entirety and the following *Sec. 8-5-6(a)* shall be substituted therefor:**

"Sec. 8-5-6(a):

Stanchion signs erected along major thoroughfares, except those signs classified as interstate signs, shall not exceed twenty-two (22) feet in height."

SECTION II:

All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed and shall be of no further force or effect from the date of the enactment of this ordinance.

SECTION III:

This ordinance shall be of full force and effect from this the *28th* day of *February 1995.*

/s/ William C. McBerry
WILLIAM C. McBERRY, MAYOR

/s/ Charles O. Sorrow
CHARLES O. SORROW, MAYOR PRO TEM

/s/ Jim Millirons
JIM MILLIRONS, COUNCILMAN

/s/ John J. Lampe
JOHN J. LAMPE, II, COUNCILMAN

/s/ Virgil L. Kilby
VIRGIL L. KILBY, COUNCILMAN

ATTEST:

/s/ Brenda J. Allen
Brenda J. Allen, City Clerk

FIRST READING: 02-14-95

SECOND READING: 02-28-95

FILED
JUL 6 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1962

In The

Supreme Court of the United States

October Term, 1997

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,

Petitioner,

v.

CITY OF MORROW, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

LAUREL E. HENDERSON*
LAUREL E. HENDERSON, P.C.
1718 Peachtree St., NW
Suite 1076
Atlanta, Georgia 30309
(404) 892-9777

ANDREW J. WHALEN, III
MULLINS, WHALEN & SULLIVAN
P. O. Box 133
Griffin, Georgia 30224
(770) 227-9456

Attorneys for Respondent

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Morrow, Georgia sign ordinance violates the free speech clause of the First Amendment, applicable to the City of Morrow by virtue of the Fourteenth Amendment, by favoring commercial over noncommercial speech.

2. Whether the Court of Appeals, in construing the Morrow sign ordinance, erred in upholding the ordinance against a First Amendment challenge in light of the ordinance's overall statutory scheme, legislative history and past city practice, all of which demonstrated allowance of noncommercial messages unrelated to the premises on signage located in the city.

3. Whether legislative findings adopted with a substantial revision to the former Morrow sign ordinance and prior to initiation of any activity by Petitioner to erect signs within the City of Morrow are sufficient to determine the governmental purposes underlying the ordinance.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENTS OF LAW AND CITATIONS OF AUTHORITY 4

Background 6

The Morrow Ordinance Does Not Favor Commercial over Noncommercial Speech; The Ordinance Was Properly Upheld by the Eleventh Circuit 9

Legislative Findings Adopted by The City of Morrow in 1994 Are Sufficient to Articulate the Governmental Purpose Underlying the Ordinance 16

Reasons for Denying Review by Certiorari 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) 15, 16

American Booksellers v. Webb, 919 F.2d 1493 (11th Cir. 1990) 14

Bailey v. U.S., ___ U.S. ___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995)..... 11

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)..... *passim*

Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995)..... 10

City of Ladue v. Gilleo, 512 U.S. 43, 114 S.Ct. 2038 (1994) 15, 16

EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981)..... 14

Forsyth County, Georgia v. Nationalist Movement, ___ U.S. ___, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992) 14

FW/PBS, Inc. d/b/a Paris Adult Bookstore II v. City of Dallas, 493 U.S. 215 (1990).....5, 10

Jackson v. City Council of Charlottesville, 659 F.Supp. 470 (W.D.Va. 1987) 15

King v. St. Vincent's Hospital, 502 U.S. 215, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991)..... 11

McCarthy v. Bronson, 500 U.S. 136, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991)..... 11

TABLE OF AUTHORITIES – Continued

Page

Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) 15

Metromedia Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ... 7, 11, 14, 20

National Advertising Co. v. City of Orange, 861 F.2d 246 (9th Cir. 1988) 15

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313, 50 L.Ed.2d 533 (1979) 14

Rappa v. New Castle County, 18 F. 3d 1043 (3d Cir. 1994) 15

Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) 13

Stone v. INS, 514 U.S. 386, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995) 13

Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale, 766 F.2d 1528 (11th Cir. 1985) 8

United States v. Edge Broadcasting Co., ___ U.S. ___, 113 S.Ct. 2696 (1993) 19

Youakim v. Miller, 425 U.S. 231 (1976) 5

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) 18

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

1. The legislative history of the sign ordinance of the City of Morrow, as it existed December 20, 1994 and as derived from the following ordinances[1] should be included with the constitutional provisions and ordinances cited by Petitioner:

Ord. 87-03, adopted May 26, 1987;

Ord. 88-07, adopted October 11, 1988;

Ord. 88-10, adopted November 8, 1988;

Ord. 91-08, adopted August 27, 1991;

Ord. 92-03, adopted February 11, 1992;

Ord. 92-10, adopted August 11, 1992;

Ord. 93-04, adopted June 22, 1993;

Ord. 93-06, adopted July 27, 1993;

Ord. 93-11, adopted October 26, 1993;

Ord. 94-02, adopted Feb. 8, 1994;

Ord. 94-04, adopted April 26, 1994.

STATEMENT OF THE CASE

This case involves a challenge under the First Amendment to the Morrow sign ordinance brought by a commercial entity seeking to erect billboard structures

[1] The ordinances cited above appear in the Stipulation of the Parties in Support of their Respective Motions for Summary Judgment. R2-21-Stipulation-Exhibit A.

within the City. Petitioner seeks to advance no particular message, but rather intends to rent space to various commercial entities for advertising.[2] The City of Morrow limits commercial signage to on-site advertising and further limits the number and size of allowable signs for businesses.

The City of Morrow first regulated commercial signage in 1974. The initial ordinance is not included in the record of this case, as a substantial rewrite of that ordinance occurred in 1987 readopting the signage chapter of the City Code in its entirety. R2-21-Stipulation-Exhibit A-2 to 17. The 1987 ordinance underwent a number of subsequent revisions, mostly minor, until April 26, 1994, when a major revision was performed as a result of litigation. *Id.* at 38 to 45. The April 26, 1994 revision included, for the first time, a detailed written statement of findings which set out the interests the City sought to protect. *Id.* at 38.

Petitioner's first approach to the City of Morrow occurred almost four months later, on or about August 15, 1994 when Petitioner's agent sought City certification that three billboard applications to the Georgia Department of Transportation met City ordinance standards. R2-22-Affidavit of Sibley-3. The City's Permits and

---

[2] While Petitioner asserts in its Amended and Restated Complaint, among other places, that the messages which would be posted on its billboards would provide a medium for commercial, political and noncommercial speech (para. 11), the District Court Judge found that Petitioner's primary purpose and desire in erecting the signs is to profit commercially. (Petition, App., 15a, note 2)

Licenses Clerk declined to sign the certifications. While numerous reasons existed for her refusal to sign, one of the reasons was a city-wide prohibition of off-site commercial advertising and billboards. R3-27-Deposition of Bean-10 to 17.

Contrary to the Statement of Facts set out in the Petition for Writ of Certiorari, Georgia law does not permit erection of billboards in violation of City zoning or sign ordinances. Within the boundaries of cities such as Morrow, certification of compliance with local ordinances is a necessary part of the permitting process. Rules of the Georgia Dept. of Transportation, Section 672-6-.04(1)(e). R2-22-Plaintiff's Motion for Summary Judgment, Exhibit A-47.

The City has adopted a comprehensive system of sign control which limits the size and number of signs utilized for commercial purposes. While there are identifiable variations, the basic system provides that each business may maintain one building mounted and one free-standing sign. R2-21-Stipulation-Exhibit B. No similar restriction exists for residential properties. *Id*. Nor are residential signs prohibited. *Id*.

Off-premise commercial advertising is specifically prohibited by section 8-5-7(c): "No sign shall be erected or maintained for commercial purposes-except on the same lot on which the business, service or product is provided." *Id*. at Section 8-5-7(c). No parallel provision restricts noncommercial advertising. As will be argued fully in the next section, Petitioner's claims on page four of its statement of facts concerning (1) a purported ban on all noncommercial speech, and (2) the lack of a purpose

clause or preamble which would support a billboard ban, is a tortured reading of the text as well as a severe distortion of the facts as found by both the district and appellate courts.

Petitioner brought suit in the United States District Court, Northern District of Georgia, on December 20, 1994. R1-1. Cross motions for summary judgment were filed. R2-22, 23. Additionally, Petitioner moved to strike the affidavit of William Ross, an expert planner, who analyzed the effect of the City's sign restrictions on the City's stated twin goals of promoting aesthetics and traffic safety. R2-25. The motion to strike was denied. R3-32-18. No appeal was taken from that ruling.

In support of its motion for summary judgment, the City put forward a number of facts. In addition to the affidavit of Ross already described, the affidavit of Brenda Allen introduced into evidence factual support for the City's past issuance of noncommercial sign permits unrelated to the premises on-which the signage was located. R2-23-Affidavit of Allen. Deposition testimony was also introduced.

Other than the motion to strike, no attempt was made by Petitioner to refute any of the facts established by documents supporting the City's motion for summary judgment.

ARGUMENTS OF LAW AND CITATIONS OF AUTHORITY

Formulating arguments in this case is particularly difficult in that none of the issues raised in the Petition

for Writ of Certiorari have been raised in similar form in the courts below. Not only do the issues as stated by Petitioner severely distort existing rulings, they misstate unrefuted facts. Respondent is therefore left in a quandry. Should it unilaterally attempt to identify earlier enumerated error on which Respondent prevailed and which appears to underlie continuing arguments in the Petition? Or should it deviate from the record and follow Petitioner's invitation to argue new ground?

At the trial level, Petitioner raised five issues.[3] On appeal, the third issue was abandoned, leaving four remaining issues. The three questions presented by Petitioner now bear little resemblance to any issues earlier presented and decided. As has been stated on several occasions, it is this Court's practice to decline to review those issues neither pressed nor passed upon below. *FW/PBS, Inc. d/b/a Paris Adult Bookstore II v. City of Dallas*, 493 U.S. 215, 224 (1990); *Youakim v. Miller*, 425 U.S. 231, on remand 431 F.Supp. 40, affirmed 572 F.2d 483, probable

---

[3] The five issues at the trial level were: (1) The Morrow sign ordinance is unconstitutional because it fails on its face to seek to implement a substantial governmental interest. (2) The Morrow Sign Ordinance is unconstitutional because it allows business and commercial signs in areas where noncommercial signs are prohibited and provides favorable treatment for business and commercial signs as opposed to noncommercial signs. (3) The Morrow sign ordinance is unconstitutional because it predetermines certain messages which may be posted without a permit, while requiring a permit for others. (4) The Morrow sign ordinance is unconstitutional because it impermissibly restricts the content of messages allowed to be placed on signs in residential zoning districts. (5) The entire sign ordinance should be stricken [as it cannot be severed].

jurisdiction noted, 434 U.S. 1060, affirmed 440 U.S. 125 (1976).

Nor does this case present novel questions the resolution of which will provide guidance to other circuits. The circuit court decision from which review is sought, like the district court decision below it, found the Morrow ordinance to be ambiguous. Both courts applied well accepted rules of construction and reached the same result, determining the ordinance to be constitutional. There is no indication from the cases cited by Petitioner, that had another circuit been provided with this case, on these facts, it would have reached a different decision.

Background

Both Petitioner and Respondent determined from the outset that the four-part test derived from *Central Hudson*[4] was the appropriate test against which to analyze the Morrow ordinance. Both the District Court and the Eleventh Circuit decisions utilized *Central Hudson* as the foundation against which to measure Morrow's ordinance. At no point in its Petition for Writ of Certiorari does Petitioner argue that *Central Hudson* is either irrelevant or in

---

[4] The Court in *Central Hudson* ruled that a restriction on otherwise protected commercial speech is valid only if it: 1) concerns lawful activity and is not misleading, 2) seeks to implement a substantial governmental interest, 3) directly advances that interest, and 4) reaches no further than necessary to accomplish the given objective. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-566, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

need of further delineation by this Court. Nor does Petitioner argue that confusion surrounds the *Central Hudson* test or that a conflict exists among the circuits in how *Central Hudson* is viewed.

The *Central Hudson* decision utilizes a balancing test in commercial speech cases, requiring a government to set out the purposes of its regulations and then measure the fit between its purposes and the effect of the regulations.

The first prong of the *Central Hudson* test requires that the proposed speech concerns lawful activity and is not misleading. This prong is not at issue.

The second prong concerns articulation of a substantial governmental interest. In support of the second prong, the City of Morrow put forward two governmental interests: aesthetics and traffic safety. Both meet constitutional muster. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further – traffic safety and the appearance of the city – are substantial governmental goals. It is far too late to contend otherwise . . . "). *Id.* at 507, 508.

Prior to suit being instituted, Morrow had substantially rewritten its sign ordinance. With the revision the City included a detailed Statement of Findings.[5] R2-21-

---

[5] Section 1 of Ord. No. 94-04 reads as follows:

The Mayor and Council find that:

(a) The City of Morrow has had in effect a comprehensive sign ordinance since September 12, 1974, governing the

Stipulation-Exhibit A-38. These findings set out clearly and without dispute the governmental interests which the City sought to protect. *Id.* Recitation in the findings of an ordinance is sufficient to identify governmental purposes involved in adoption of that ordinance. *Supersign of Boca Raton, Inc. v. City of Ft. Lauderdale,* 766 F.2d 1528, 1529 (11th Cir. 1985). While Petitioner disputes the City had established its purposes, it has provided no evidence refuting the stated purposes or suggesting any improper motives by City officials.

---

location, size and number of signs which can be erected in the City, such ordinance has its highest impact on commercial areas of the City;

(b) Said ordinance and its amendments have sought to ensure a balancing of the rights of individuals and businesses to make information available through signage with the rights of the public to clean, aesthetically pleasing, and safe business thoroughfares;

(c) As a result of its comprehensive sign regulatory scheme, commercial areas of the City of Morrow present an aesthetically pleasing environment which supports and promotes robust business activity within the City, as well as providing a zone for traffic substantially free of unsafe diversions;

(d) The intention of the City in its enforcement efforts has never been directed toward the content of advertising in the City;

(e) There nevertheless appear to be some ambiguities in the text of the ordinance which have resulted in confusion of the City's purposes by certain persons desirous of erecting signs within the City;

(f) It is the desire of the Mayor and Council of the City of Morrow to amend the terms of the ordinance so as to clarify its practice and procedures. R2-21-Stipulation-Exhibit A-38.

Prongs 3 and 4 of the *Central Hudson* test measure the "fit" between an ordinance and its espoused purposes. The Affidavit of William Ross, City Planner, shows that from a planning perspective the sign ordinance has been quite effective in limiting the overall number of signs within the City and with ensuring that messages on those signs are clearly visible and pose minimum confusion to motorists. R23-Affidavit of Ross-Exhibit B. Hence the City's expert found both goals to have been well met. *Id.* While Petitioner moved to strike the Affidavit of William Ross in the District Court, its motion was denied. No appeal was taken therefrom. Nor did Petitioner introduce any facts refuting the City's success in meeting its stated purposes.

The only relevant evidence before the District Court, therefore, was that a substantial fit existed between the legitimate articulated purposes of the ordinance and the manner in which the ordinance met those purposes.

The Morrow Ordinance Does Not Favor Commercial over Noncommercial Speech; The Ordinance Was Properly Upheld by the Eleventh Circuit.

Petitioner has alleged at each level of review that the Morrow ordinance impermissibly favors commercial over noncommercial speech. Petitioner looked to the definition of "billboard"[6] and concluded that due to the term's

---

[6] Billboard is defined as an "advertising sign or a sign which advertises a commodity, product, place or thing, which is not located, found or sold on the premises upon which the sign is located; usually found along or near major roadways and of such size as to catch the attention of the motoring public and may sometimes be illuminated or animated."

definition, the ban on billboards includes a ban on all off-site commercial and noncommercial signs. (Petition, 4). Respondent introduced both factual evidence and arguments to the contrary.[7] The meaning of "billboard" is therefore at issue.

In attempting to analyze Petitioner's arguments, both the District Court and the Eleventh Circuit found the Morrow ordinance to be ambiguous, thereby necessitating construction. Petition, App. 12a, 21a. Where statutory terms are at issue, their interpretation is a question of law, and it is the Court's duty to define the appropriate standard. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). Petitioner does not argue that construction is unnecessary; it simply argues that the Court reached the wrong result. By failing to challenge the Court's decision that construction of the term "billboard" is necessary, Petitioner is bound by that determination. *FW/PBS, Inc.* at 224.

The District Court's and Eleventh Circuit Court's ruling that the Morrow sign ordinance does not favor commercial speech is well supported by established principles of statutory construction concerning the ordinance taken as a whole, its legislative history, and the City's interpretation and practice concerning the ordinance's enforcement.

---

[7] Respondent's factual evidence in support of its interpretation of billboard as prohibiting only off-premise commercial advertising included the City's past history in issuing permits for noncommercial signs which were unrelated to the premises on which the messages were displayed. R2-23-Affidavit of Allen-2, 3.

A statute is to be read as a whole, because the meaning of statutory language, plain or not, depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221, 112 S.Ct. 570, 574, 116 L.Ed.2d 578, (1991), on remand, 971 F.2d 641; *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991) (statutory language must always be read in its proper context); *Bailey v. U.S.*, ___ U.S. ___, 116 S.Ct. 501, 506, 133 L.Ed.2d 472 (1995), on remand, 1996 WL 103727 (in determining meaning of words used in a statute, court considers not only the bare meaning of the word, but also its placement and purpose in statutory scheme; a word's meaning, plain or not, depends on context).

The neutral context of the Morrow ordinance is clearly seen when compared with the provisions found defective in San Diego's ordinance in the *Metromedia* decision. The fatal flaw in San Diego's ordinance was that it limited permissible language on on-premise signs to commercial information: "Only those outdoor advertising display signs, hereinafter referred to as signs in this division, which are either signs designating the name of the owner or occupant of the premises; or signs advertising goods manufactured or produced, or services rendered on the premises upon which said signs are placed, shall be permitted." *Metromedia* at 806. This restriction was deemed to prohibit noncommercial messages, thereby favoring commercial over noncommercial speech and resulted in the ordinance being invalidated. *Metromedia* at 810.

By contrast, Morrow, in defining signage, includes no such content restriction. Permanent signage is defined to

include freestanding signs and wall signs. A "freestanding sign" is "a sign securely affixed to a steel support structure which is permanently attached to the ground and wholly independent of any building for support, such as monument or stanchion signs." R2-21-Stipulation-Exhibit B-Section 8-5-1(6). Similarly, a "wall sign" is defined as "a sign fastened, placed or painted upon, or parallel to the exterior wall of the structure itself, whether front, rear or side of the structure and which shall not exceed dimension and lighting restrictions imposed elsewhere in this chapter." R2-21-Stipulation-Exhibit B-Section 8-5-1(22). Morrow specifically prohibits all off-premise commercial advertising, R2-21-Stipulation-Exhibit B-Section 8-5-7(c), but includes no similar prohibition of noncommercial advertising.

The content neutrality of the Ordinance is further demonstrated when the legislative history of the ordinance is taken into consideration. As readopted in 1987, the Morrow sign ordinance allowed businesses to erect primary and secondary identification signs. Definitions of primary and secondary identification signs closely paralleled San Diego's invalid provisions. The definition for "primary identification sign" read: "A permanent freestanding sign (monument or stanchion) which has, as its purpose, to identify the business, premises or principal product or services obtainable on the premises where the sign is located." R2-21-Stipulation-Exhibit A-3. Similarly, the definition for "secondary identification sign" read: "A sign permanently affixed to the building wall or facia which has, as its purpose, to identify the business premises or principal product or service obtainable on the premises where the sign is located." R2-21-Stipulation-

Exhibit A-3. As initially enacted, therefore, the Morrow ordinance contained a similar defect as that identified in San Diego – on premise signage was limited to commercial speech only, locking out noncommercial expression. In that context, a billboard ban effectively cut off all forms of noncommercial communication through signage.

Unlike San Diego, however, Morrow amended its ordinance to remove content restrictions from "on-premise" signage. A business owner is free to include any message, so long as it (1) does not advertise commercial activity, products or services unrelated to the premises, (2) is not obscene, and (3) does not simulate an official traffic control or warning sign. R2-21-Stipulation-Exhibit B-Secs. 8-5-7(c), 8-5-9(b), 8-5-9(a).

Morrow's Mayor and Council, its legislative body, has therefore given a clear indication of its legislative intent. *Reves v. Ernst & Young*, 507 U.S. 170, 177, 113 S.Ct. 1163, 1169, 122 L.Ed.2d 525 (1993). When a legislature acts to amend its earlier statutes, the presumption is that it intends its amendment to have real and substantial effect. *Stone v. INS*, 514 U.S. 386, 115 S.Ct. 1537, 1545, 131 L.Ed.2d 465 (1995).

Moreover, Morrow's practice supports the interpretation given the meaning of the term "billboard" by the Court. Morrow documented a three year history of permitting noncommercial off-premise signs to be posted on commercial properties throughout the city. R2-23-Affidavit of Allen, 2, 3. In evaluating a facial challenge to the constitutionality of an ordinance, a reviewing court must consider the jurisdiction's own authoritative construction

of the ordinance, including its implementation and interpretation. *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395, 120 L.Ed.2d 101, 111-112(1992), and must construe any ambiguity, if possible, in a manner which avoids any constitutional problems. *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990), cert. denied, 500 U.S. 942, 111 S.Ct. 2237, 114 L.Ed.2d 479 (1991); *see also EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 285 (5th Cir. 1981), cert. denied, 456 U.S. 905, 102 S.Ct. 1749, 72 L.Ed.2d 161 (1982) (quoting *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, 99 S.Ct. 1313, 1320, 50 L.Ed.2d 533, 542 (1979)).

From the above discussion, it is clear that while the *Metromedia* decision was relevant to the facts of this case, and, in fact, was relied upon by both parties, it was not dispositive. Yet the Petition for Certiorari relies almost exclusively on *Metromedia* in seeking review of the case at bar, citing unparalleled confusion in existing case law applying that decision.

Merely citing a result, however, such as counting the number of ordinances which were upheld as opposed to the number of ordinances which were invalidated (Petition, 12), is unhelpful. Each case turns on its own facts. For sign cases, each case turns on its specific language and structure. In the case at bar, the determination by the Court that all noncommercial speech is on-site where generated by the speaker is not the holding, but rather a rationale underlying that holding. Where as in the case of the Morrow ordinance, construction is necessary to determine the reach of limiting provisions, the rationale will coincide with or follow the outcome of the construction.

A more helpful approach is to look at the overall statutory scheme of the ordinances or statute at issue. Those schemes which prohibit all signs, then allow for certain exemptions have frequently been invalidated. *See City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038 (1994) (ordinance prohibited all signs in residential areas except residence identification signs, for sale signs and signs warning of safety hazards); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994) (state statute prohibited all signs on or within a certain distance of right-of-way of public highways, then exempted certain signs from the prohibition based on content); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988) (in which the Court interpreted Orange's ordinance as prohibiting all signs unrelated to activity on the premises, but permitted a number of exemptions to the prohibition, the exemptions requiring the content of signs to be approved by the City); *Jackson v. City Council of Charlottesville*, 659 F.Supp. 470 (W.D.Va. 1987) (which banned all signs except those identified on premises upon which the sign was based, or advertising goods manufactured or produced for services rendered on the premises upon which signs were placed).

Conversely, ordinances which do not contain an outright prohibition or which prohibit signs without discrimination have been upheld. *See, e.g., Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (ordinance prohibiting posting of any signs on public property deemed constitutional).

The remaining case cited by Petitioner in support of its position is not to the contrary. *Ackerley Communications of Massachusetts, Inc. v. City of Cambridge*, 88 F.3d 33 (1st

Cir. 1996) involved the interplay between a local ordinance and a state law. The Court found that the interplay between the two could not withstand constitutional challenge, even though it found the ordinance to be free of constitutional defects. *Id.* at 40.

Unlike *Ladue* and other decisions which have invalidated general prohibitions on signs while allowing enumerated exceptions, Morrow's ordinance contains no such prohibition. A prohibition can only be inferred by reading the definition of "billboard" to the exclusion of the remainder of the ordinance, an approach which the District Court and Eleventh Circuit properly declined to follow.

Legislative Findings Adopted by The City of Morrow in 1994 are Sufficient to Articulate the Governmental Purpose Underlying the Ordinance.

Petitioner specifically challenges the adoption of a Statement of Findings in 1994 as part of a comprehensive ordinance revision as sufficient to articulate a significant governmental interest under the *Central Hudson* test. Petitioner's argument in this regard has changed substantially over time. In its Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Petitioner flatly stated: "In enacting this restrictive regulation on free speech, the city has failed to identify any governmental interests which its regulation seeks to advance. Nowhere within the Morrow Sign Ordinance are there any purposes described forming the basis for the enactment of the city's ban on billboards or its other extensive regulations on signs." R2-22-Memorandum-5. "The City of Morrow has offered no justification for its broad-based

regulation of signs within the city. . . . Moreover, because the ordinance itself contains no statement of any substantial governmental interest it seeks to advance . . . " *Id.* at 8, 9.

Petitioner, Plaintiff below, totally ignored the Statement of Findings which were enacted with Ord. No. 94-04. The District Court, however, utilized those findings in its Order and distinguished Morrow's adoption, which had preceded Petitioner's approach to the City, from cases cited by the Petitioner in which justifications for the jurisdiction's ordinances were set out for the first time in arguments posed by attorneys during the course of litigation. (Petition, App., 19a, 20a).

Having lost its argument concerning lack of a significant governmental interest, Petitioner could have appealed the District Court's ruling as error, raising the argument now presented to this Court. What Petitioner did, however, was to approach the Eleventh Circuit with a sleight of hand. "The Morrow Sign ordinance contains no purpose clause or preamble to explain the basis for its restriction on speech." R-Brief of Appellant, 5. "Since the ordinance contains no preamble or purpose clause, the appellee and the district court relied upon certain 'findings' included within an amendment to the ordinance adopted on April 26, 1994, in an attempt to explain the substantial governmental interests sought to be implemented which the city contends vests it with the power to abridge its citizens' rights to free speech." *Id.* at 15. On appeal Petitioner characterized the findings as nothing more than after-the-fact conclusions regarding the initial 1974 enactment, *id.* at 17-20, a position which was seriously misleading, given the District Court's order.

Petitioner then took the position at oral arguments that the statement of purpose was added to the ordinance *after* it had applied for billboard permits, a position totally at odds with the written record. *Id.* at 5a. Not only did the Appellate Panel have to force a concession from Petitioner concerning the existence of the findings at oral arguments, *id.*, it had to force the admission that the ordinance preceded Petitioner's applications, the last concession leading to the footnote which appears at note 4 of the Circuit Court decision. *Id.* at 6a.

Petitioner now appears before this Court, having omitted the date on which it first sought City approval for its permits. In keeping attention focused backward over a 20 year span, Petitioner attempts to deflect attention, once again, from the fact that the findings were in place *prior to* Petitioner's approach to City officials. Further, Petitioner neglects to reference the facts, as found by the District Court through the uncontroverted admissible testimony of William F. Ross, which demonstrates that the fit required under *Central Hudson* between purpose and effect have been met. Petition, App., 20a, note 6. As authority for its arguments, Petitioner cites *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49, 105 S.Ct. 2265, 2280, 85 L.Ed.2d 652 (1985). The unsupported assertions referenced in *Zauderer*, however, were arguments first raised by counsel in the context of litigation. *Zauderer* holds no support for the supposition that findings enacted with an ordinance which precede an approval request under the ordinance are unsupported, after-the-fact articulations.

Respondents respectfully submit that this issue is inappropriate for appellate review. Petitioner's repeated

mischaracterization of clear documentary evidence and its failure to confront the lower court ruling head-on if it sought a change in the law should preclude any further consideration.

Public policy dictates that a legitimate articulated purpose must be upheld even if it comes chronologically late in an enactment's life. Following Petitioner's argument to its logical conclusion would mean that because Morrow had not initially articulated a purpose for its ordinance, it would be forever barred from doing so. Any attempt, therefore, by the City to regulate signage would be forever barred. From a public policy perspective, this argument has no merit. Regulation of signage is a legitimate governmental function. No retroactive application of the findings have been attempted. Rather the City asserts the findings to be prospective in nature and therefore applicable to this case since they were enacted prior to Petitioner's approach to the City.

Reasons for Denying Review by Certiorari.

Rule 10 of the Rules of the U.S. Supreme Court states, in part, "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted *only* for *compelling* reasons." (emphasis added) No compelling reason exists in this case. The Court has stated repeatedly that commercial speech, while protected, is subject to a lesser degree of protection than noncommercial speech. *See, e.g., United States v. Edge Broadcasting Co.*, ___ U.S. ___, 113 S.Ct. 2696, 2703 (1993).

The interest which Petitioner seeks to protect in this instance is of even lesser status. Petitioner has no particular message it wishes to convey; rather it desires to erect physical structures, devoid of any message, in order to make money from the messages of other people, whatever those messages might be. While it is theoretically possible that the billboard structures could be used at some point in time to advertise a noncommercial message, testimony of Petitioner's agent at deposition made clear that Petitioner believed its client base would be primarily commercial and that it was his intent to make money. R2-24-Deposition of Anderson-6 to 24.

Petitioner's claim for hearing rests almost entirely on *Metromedia* and its progeny. Yet decision in this case did not turn on *Metromedia*, but on the *Central Hudson* analysis. The case could have been decided in the same fashion with the same analysis, even had *Metromedia* never existed.

But most importantly, this case rises and falls on the construction given one local ordinance by the Eleventh Circuit Court of Appeals. It is peculiarly tied to the ordinance's language and history. While the Eleventh Circuit decision is of utmost important to the parties in this case, there is little which would be usable as guidance to other jurisdictions across the United States which cannot be gleaned from a careful and responsible reading of existing sign case law.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

LAUREL E. HENDERSON*
LAUREL E. HENDERSON, P.C.
1718 Peachtree St., NW, Suite 1076
Atlanta, Georgia 30309
(404) 892-9777

ANDREW J. WHALEN, III
MULLINS, WHALEN & SULLIVAN
P. O. Box 133
Griffin, Georgia 30224
(770) 227-9456

Attorneys for Respondent

* *Counsel of Record*

Supreme Court, U.S.
FILED
JUL 28 1998
OFFICE OF THE CLERK

No. 97-1962

In The

Supreme Court of the United States

October Term, 1997

SOUTHLAKE PROPERTY ASSOCIATES, LTD.,

Petitioner,

v.

CITY OF MORROW, GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

DAVID H. FLINT*
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT, LLP
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

Attorneys for Petitioner
* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether a municipal ordinance which allows on-site commercial advertising signs, prohibits on-site non-commercial advertising signs, and prohibits all off-site commercial signs (billboards) violates the First Amendment.

2. Whether a municipal ordinance's ban of all off-site noncommercial advertising signs can withstand a First Amendment challenge by construing the ordinance so that all noncommercial advertising signs are considered on-site signs which are not prohibited by the ordinance.

3. Whether a municipality can satisfy its burden of proving that a ban of off-site commercial signs (billboards) implements and directly advances no further than necessary a substantial governmental interest by adopting legislative findings and a purpose resolution twenty years after the enactment of the ban.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

I. The Respondent's Ban On Billboards Impermissibly Affects Noncommercial Speech 1

II. Respondent's Scheme Of Prohibiting Commercial Off-Site Signs While Allowing Noncommercial Off-Site Signs Is An Insufficient Fit Between The City's Means And Ends 2

III. Lower Appellate Courts Have Divided In Their Application Of *Metromedia v. City Of San Diego* 4

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993) ...3, 4

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) 3, 4, 5, 6

UNITED STATES COURT OF APPEALS DECISIONS

Ackerley Communications, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996) 5

Ackerley Communications of Massachusetts, Inc. v. City of Somerville, 878 F.2d 513 (1st Cir. 1989) 6

Messer v. City of Douglasville, 975 F.2d 1505 (11th Cir. 1992), *cert. denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993)..... 6

Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988), *cert. denied*, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994)..... 6

Wheeler v. Commissioner of Highways, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988)..... 7

UNITED STATES DISTRICT COURT DECISIONS

Jackson v. City Council of Charlottesville, 659 F.Supp. 470 (W.D.Va. 1987), *aff'd in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988)..... 5

TABLE OF AUTHORITIES

Page

STATE APPELLATE COURT DECISIONS

Adams Outdoor Advertising v. Newport News, 373 S.E.2d 917 (Va. 1988) 6

Norton Outdoor Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982) 6

Union City Board of Zoning Appeals v. Justice Outdoor Displays, 266 Ga. 393, 467 S.E.2d 875 (1996) ...5, 6

I. The Respondent's Ban On Billboards Impermissibly Affects Noncommercial Speech

In its brief in opposition to petitioner's petition for certiorari, the respondent contends that the petitioner's interest in erecting signs in the City of Morrow is only commercial in nature. The respondent states that the case was brought "by a commercial entity seeking to erect billboard structures" intending "to rent space to various commercial entities for advertising." Respondent's brief at 1-2.

The respondent's characterization of petitioner's interest in erecting billboards in the City of Morrow is incorrect. While the petitioner's interest is to profit commercially, it is possible to profit commercially while posting noncommercial messages. For example, candidates for political office spend substantial sums on outdoor advertising in connection with their political campaigns. While the billboard owner may profit commercially by accepting payments from the political candidate in exchange for posting the candidate's message on the company's billboards, the message conveyed is pure political, noncommercial speech.

The respondent contends that the City's ban on billboards will not affect noncommercial speech. The flaw in the respondent's argument that noncommercial speech is not impacted is underscored by the respondent's admission that one of the reasons for denial of petitioner's request for approval of its sign permits "was a city-wide prohibition of off-site commercial advertising and billboards." Respondent's brief at 3. The record shows that the applications submitted to the respondent's permits

and licenses clerk requesting her approval of the construction of four billboards did not indicate whether the message to be placed on the proposed billboards would be commercial or noncommercial. The applications sought permission to build sign structures and made no mention of the messages to be placed on them. As a result, the clerk had no way of knowing whether the proposed signs would bear commercial or noncommercial messages and yet the applications were denied.

Contrary to the respondent's argument that permits are always issued for noncommercial advertising signs, permits were denied the petitioner even though no representation was made that the messages to be placed on the proposed signs would be commercial. The conclusion to be drawn from the actions of the City in response to petitioner's applications is that by banning billboards the challenged ordinance in fact bans both commercial and noncommercial signs, whether they be deemed on-site or off-site. Because it is clear that on-site commercial signs are permitted, the result is that the ordinance – both as written and as applied – favors commercial over noncommercial speech in violation of the First Amendment.

II. Respondent's Scheme Of Prohibiting Commercial Off-Site Signs While Allowing Noncommercial Off-Site Signs Is An Insufficient Fit Between The City's Means And Ends

The Court of Appeals upheld the City of Morrow's prohibition on billboards by concluding that "all

noncommercial speech is on-site."[1] (App., *infra*, at p. 12a). It also found that the City's interest in restricting signs is based on concerns of aesthetics and traffic safety. (App., *infra*, at pp. 5a-6a). Thus, the court concluded that the City may allow noncommercial signs throughout the City while prohibiting off-premise commercial signs city-wide to further the City's interest in aesthetics and traffic safety. This decision squarely conflicts with this Court's ruling in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993).

Just as there was an insufficient fit in *Discovery Network* between Cincinnati's means and ends in prohibiting commercial newsracks while allowing noncommercial newsracks, because Cincinnati's approach would leave in place a large percentage of the city's many newsracks, *id.* at 417, 113 S.Ct. at 1510, there exists in this case an insufficient fit between the City of Morrow's means and ends because its approach leaves in place a large percentage of signs which the City has deemed to be unsafe and aesthetically displeasing. The following discussion from *Discovery Network* is instructive:

> The Chief Justice is correct that seven Justices in the [*Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981)] case

---

[1] The Court of Appeals' self-described "alternative view" of noncommercial signs has been described as "somewhat tortured." One commentator believes it doubtful that government officials attempting to distill guidelines from the decision will reach constitutionally consistent results. Elizabeth C. Pennewill, *Recent Developments*, 27 Stetson Law Review 1018, 1023 (1998).

> were of the view that San Diego could completely ban off-site commercial billboards for reasons unrelated to the content of those billboards. *Post*, at 1524-1525. Those seven Justices did not say, however, that San Diego could *distinguish* between commercial and noncommercial off-site billboards that cause the same esthetic and safety concerns. That question was not presented in *Metromedia*, for the regulation at issue in that case did not draw a distinction between commercial and noncommercial off-site billboards; with a few exceptions, it essentially banned *all* off-site billboards.

507 U.S. at 425 n.20, 113 S.Ct. at 1514 n.20.

The question not presented in *Metromedia* is presented here: may the City of Morrow distinguish between commercial and noncommercial off-site billboards that cause the same aesthetic and safety concerns? The Court of Appeals concluded that the City may distinguish between commercial and noncommercial off-site billboards causing the same aesthetic and safety concerns by banning off-site commercial billboards and allowing off-site noncommercial billboards. The court's decision is contrary to the analysis employed by this Court in *Discovery Network* in reviewing Cincinnati's ban on commercial newsracks.

III. Lower Appellate Courts Have Divided In Their Application Of *Metromedia v. City Of San Diego*

Notwithstanding the diverse and often directly conflicting decisions of lower courts applying this Court's plurality opinion in *Metromedia v. City of San Diego*, 453

U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), the respondent contends that certiorari should be denied because the plurality decision in *Metromedia* has been applied uniformly. The respondent's argument contrasts sharply with the Court of Appeals' decision in the instant case, where the court expressly acknowledged that the Fourth and Ninth Circuits have invalidated ordinances almost identical to the City of Morrow's, while the Tenth Circuit has upheld a similar ordinance. (App., *infra*, pp. 10a-11a n.8). The respondent seeks to convince this Court that *Metromedia* has been routinely applied with each case turning on its own facts. Respondent's brief at 14. It must be noted, however, that of the twenty cases identified in petitioner's brief (brief of petitioner at 12-13 n.2) which have divided in their application of *Metromedia*, the respondent only contends that two of the holdings are consistent with *Metromedia* and "turn on their own facts." While the respondent seeks to distinguish its ordinance from those considered in *Jackson v. City Council of Charlottesville*, 659 F. Supp. 470 (W.D.Va. 1987), *aff'd in part, vacated in part and remanded*, 840 F.2d 10 (4th Cir. 1988), and *Ackerley Communications, Inc. v. City of Cambridge*, 88 F.3d 33 (1st Cir. 1996), it has ignored the holdings of the other nine cases set forth under "Distinction Held Unconstitutional" on page 12 of petitioner's brief, and all of the cases described under "Distinction Held Constitutional."

To underscore the fact that a split exists among appellate courts seeking to apply this Court's plurality decision in *Metromedia*, one may focus not only on the contrary decisions expressly cited by the Court of Appeals in the instant case, but also the decision of the Supreme Court of Georgia in *Union City Board of Zoning*

Appeals v. Justice Outdoor Displays, 266 Ga. 393, 467 S.E.2d 875 (1996). In that case the Supreme Court of Georgia, seeking to apply *Metromedia*, adopted the reasoning of the First Circuit in *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989), and expressly rejected the holding of the Eleventh Circuit in *Messer v. City of Douglasville*, 975 F.2d 1505 (11th Cir. 1992), *cert denied*, 508 U.S. 930, 113 S.Ct. 2395, 124 L.Ed.2d 296 (1993). Contrary to the holding in *Messer* that an ordinance allowing on-premise signs while banning off-premise signs within a particular district of the city "regulates signs not based on the viewpoint of the speaker, but based on the location of the signs," 975 F.2d at 1509, the Supreme Court of Georgia held that *Messer* would permit the very result proscribed in *Metromedia*: "with respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Justice Outdoor Displays*, 266 Ga. at 397, 467 S.E.2d at 880, quoting *Metromedia*, 453 U.S. at 515, 101 S.Ct. at 2896.

The split among appellate courts attempting to apply *Metromedia* is graphically underscored by the disagreement in its application by the Eleventh Circuit Court of Appeals and the Supreme Court of Georgia. While these courts are separated by only five city blocks geographically, their applications of this Court's holding in *Metromedia* are miles apart theoretically. As a result, the state of the law in Georgia, and in other states[2] depends on

---

[2] *Compare Adams Outdoor Advertising v. Newport News*, 373 S.E.2d 917 (Va. 1988) with *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), *cert. denied*, 115 S.Ct. 317, 130 L.Ed.2d 278 (1994); and *compare Norton Outdoor*

whether a challenge to sign regulations such as those adopted by the City of Morrow is decided in state or federal court.

The petitioner respectfully requests that the Court grant its petition for certiorari to provide answers to the questions here presented so that the rules applicable to local governments and billboard companies will be the same throughout the land.

Respectfully submitted,

DAVID H. FLINT*
MARK W. FORSLING
SCHREEDER, WHEELER & FLINT, LLP
1600 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303-1845
(404) 681-3450

Attorneys for Petitioner

**Counsel of Record*

July 28, 1998

Advertising, Inc. v. Village of Arlington Heights, 69 Ohio St.2d 539, 433 N.E.2d 198 (1982), with *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 702, 98 L.Ed.2d 653 (1988).